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Supreme Court, U.S.
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No. -

In the Supreme Court of the United States

SPRING TERM, 1986

WNEV-TV, NEW ENGLAND TELEVISION CORP.,
PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LAURENCE S. FORDHAM *
ANN E. JOHNSTON
FORDHAM & STARRETT
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300
Attorneys for Petitioner

* Attorney of Record

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I

QUESTIONS PRESENTED

1. Did the Court of Appeals err in ordering arbitration of a claim based solely upon a non-contractual change of past practice, under a narrow arbitration clause which is limited to contract-based claims only?

2. Did the Court of Appeals err in ordering arbitration of claims "which on [their] face [are not] governed by the contract" [*United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960)] where the contract sections cited by the Union do not relate even remotely to the subject matter of the underlying grievance?

3. Did the Court of Appeals err in ordering arbitration when the contract prerequisites for arbitration were not met, and the contract explicitly bars arbitration when they are not met?

II

STATEMENT REQUIRED BY RULE 28.1

WNEV-TV, New England Television Corp., is incorporated in the Commonwealth of Massachusetts. It has no parent company, subsidiaries or affiliates.

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Opinion Below

The opinion of the United States Court of Appeals for the First Circuit (Torruella, J.) is reported at 778 F.2d 46 (1985) and is reprinted in Appendix hereto, p. A-1, *infra*.

The memorandum and order of the United States District Court for the District of Massachusetts (Skinner, J.) has not been reported. It is reprinted in Appendix hereto, p. A-11, *infra*.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on November 27, 1985. Petitioner filed a timely Petition for Rehearing on December 11, 1986. The Petition was denied in an Order entered January 6, 1986,

which is reprinted in Appendix hereto, p. A-17, *infra*. The jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. §1254(1).

Statutory Provisions

The following provisions of the Labor-Management Relations Act, 1947, 29 U.S.C. §§141-187, are involved in the matter before the Court:

29 U.S.C. §171. DECLARATION OF PURPOSE AND POLICY.

"It is the policy of the United States that—

* * *

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by...such methods as may be provided for in any applicable agreement for the settlement of disputes..." Labor-Management Relations Act, 1947, §201(b).

29 U.S.C. §173. FUNCTION OF SERVICE.

* * *

"(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement..." Labor-Management Relations Act, 1947 §203(d).

29 U.S.C. §185. SUITS BY AND AGAINST LABOR ORGANIZATIONS.

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." Labor-Management Relations Act, 1947 §301(a).

Statement of the Case

Broadly, the petition addresses the role of a court to compel arbitration of a labor-management dispute under Section 301(a) of the Labor-Management Relations Act of 1947. More particularly, the case inquires whether there has been consent to arbitration in the agreement of the parties and presents three questions: (a) whether arbitration may be ordered of a claim based solely upon a non-contractual change of past practice, under a narrow arbitration clause which is limited to contract-based claims only, (b) whether arbitration may be ordered of insubstantial contract claims which do not on their face relate even remotely to the subject matter of the underlying grievance, and (c) whether arbitration may be ordered when the contract prerequisites for arbitration were not met, and the contract explicitly bars arbitration where they are not met.

Although the First Circuit's decision facially follows the principle that the courts are not to consider the merits of a claim, it ignores the fundamental principle that a party cannot be compelled involuntarily to arbitrate a dispute that the party has not, by contract, agreed to arbitrate. The Court decided for the first time that a non-contractual claim of past practice is arbitrable under an arbitration agreement limited to contract-based claims. Thus, it compels the submission to arbitration of a dispute for which there is no consent to arbitrate in the agreement of the parties. The Court also orders arbitration of contract claims which on their face do not even remotely relate to the subject matter of the underlying grievance. The Court does so where the claims were made months after they were due, under an agreement which explicitly bars arbitration of such claims.

Petitioner WNEV-TV, New England Television Corp., ("WNEV-TV") and respondents International Brotherhood of Electrical Workers, Local 1228, AFL-CIO (the "Union") are parties to a collective bargaining agreement (the "Agreement")

which was in effect at all times pertinent to the matter before before this Court.[1] The parties contracted to arbitrate only "all complaints, disputes, or questions as to the interpretation, application or performance of *this Agreement*. . . (emphasis added)" and only where a written notice filed "within thirty (30) days of the occurrence" specified the *contract sections* allegedly violated. The Agreement explicitly provides that "no grievance may be submitted to arbitration unless *thus submitted*. . . (emphasis added)" in writing within 30 days, including specification of "*the sections of the contract* claimed to have been violated. . . (emphasis added)." Art. III, §3.01, reprinted in Appendix hereto, p. A-18, *infra*. The Agreement explicitly provides that the arbitrator has power only to "interpret" the Agreement and no power to modify or "change" the contract "in any way." Art. III, §3.02, reprinted in Appendix hereto, p. A-19, *infra*. The parties further expressly agreed that management retained "the exclusive right to manage its business," "[s]ubject only to any limitations expressly stated in this Agreement. . . ." Art. VIII, §8.05(c), reprinted in Appendix hereto, p. A-20, *infra*.

On April 2, 1984, WNEV-TV notified the Union by letter that a lounge on the second floor of its facility (the "technicians' lounge") would be discontinued. R. 65. Nowhere in the Agreement is there any reference to the technicians' lounge, or incorporation of the alleged past practice into the Agreement.[2]

The technicians' lounge had been used by the technicians since April 1982 when WNEV-TV first occupied its present facility. R. 72. The closing of the technicians' lounge was done to provide space for the Vice President-Engineering and his staff, who manage the technicians. R. 81-82. It also coincided

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[1] The term for the collective bargaining agreement between the Union and WNEV-TV is April 1, 1983 through at least July 1, 1986.

[2] The parties specifically incorporated approximately fifteen past practices in various provisions of the Agreement, but they made no reference whatsoever to continuance of a technicians' lounge. *See* Appendix hereto, p. A-21, *infra*.

with the expansion, improvement and renovation of the cafeteria for the benefit of all employees. R. 82.

On April 9, 1985, the Union filed a written grievance on a "IBEW Local 1228 Grievance Form" setting forth the Union's complaint. Although the form provided space for the citation of the "Article(s) and Section(s)" of the Agreement allegedly violated, the Union stated only "Past Practice" as the basis for its grievance. R. 97. Thus, the Union initially sought to grieve the elimination of the technicians' lounge solely on the basis of past practice.

The Union continued to assert its grievance solely on the basis of the alleged past practice for several months. R. 101. The Union explicitly acknowledged and maintained in writing as follows:

> "The Technicians' Lounge was a benefit of employment *not described in the Agreement*, but, *by past practice*, it has always been provided to Technicians (emphasis added)."

R.99.

Despite such acknowledgment, over two months after the Union filed its grievance and after the conclusion of the grievance procedure, in a belated attempt to force arbitration of a claim previously based solely upon a past practice not incorporated into the contract, the Union for the first time asserted that specific contract provisions had a bearing on the former technicians' lounge. R. 67.

Over four months after the filing of the written grievance, the Union identified still other contractual provisions which it asserted had bearing on the disputed lounge, and thereby made arbitrable the claim of discontinuance of it. R. 69.

WNEV-TV consistently stated that the alleged past practice was not provided for in the Agreement and was not arbitrable under its contract-based arbitration provision. When WNEV-TV refused to arbitrate the dispute over the alleged past prac-

tice relating to the technicians' lounge on the grounds that the dispute was not arbitrable, the Union first filed charges with the National Labor Relations Board. These were dismissed, and the dismissal was affirmed. R. 110. The Union next filed this action to compel arbitration in the District Court for the District of Massachusetts.

In the District Court, the issue was whether the discontinuance of the technicians' lounge is a past practice governed by the Agreement and thereby subject to voluntary arbitration by consent of the parties, pursuant to the terms of the Agreement's contract-based arbitration clause. Both the Union and WNEV-TV filed motions for summary judgment.

The District Court granted summary judgment to WNEV-TV. The District Court reasoned that the principles favoring arbitration were limited by the rule that:

> "[t]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement in fact creates such a duty."

See Appendix, p. A-13, *infra* (citing *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964)). The District Court held the arbitration clause established that WNEV-TV had contracted to arbitrate only claims dealt with in the collective bargaining agreement. Therefore, the claim of past practice was not arbitrable because it was not in the Agreement. It also held that the contract provisions cited by the Union were not reasonably susceptible to an interpretation creating a duty to maintain the technicians' lounge. It found that the provisions belatedly cited by the Union neither facially nor by "fair implication" compelled submission to arbitration. *See* Appendix, p. A-15, *infra*.

The First Circuit reversed the District Court and remanded the matter for action consistent with its opinion. Pointing to the the District Court's language that the alleged contract claims

"appear to create an issue sufficiently substantial to require submission to an arbitrator," see Appendix, p. A-4, *infra*, it concluded that the District Court had decided the merits of the matter and had exceeded its role in suits to compel arbitration.

As to the Union's initial sole claim of past practice, citing *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-582 (1960), the First Circuit stated that a past practice can be incorporated even though not mentioned. Consequently, it declined to hold the past practice was excluded from arbitration. However, the First Circuit previously and explicitly recognized that, although past practice "may be incorporated into specific contractual language," the Agreement contained no such provision as to the technicians' lounge. *See* Appendix, p. A-3, n.1 *infra*.

Finally, the Court concluded that the challenge regarding the Agreement's explicit bar of arbitration where the contract prerequisites for arbitration were not satisfied was an issue of impermissible procedure to be decided by the arbitrator. It further noted that failing to file might create an issue of arbitrability to be determined by the court. *See* Appendix, p. A-9, A-10, *infra*.

Reasons For Granting The Writ

This Court has not dealt pervasively with issues of arbitrability in labor relations since 1960. *See United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation*, 363 U.S. 593 (1960). Confusion reigned before the end of the decade, and it reigns today, as to when a matter is arbitrable and as to what particular form of words may preclude arbitration under

what kind of clause.[3] Some courts look to implied rights, others do not; some give careful scrutiny to the language of the arbitration clause, others do not; some look for an explicit substantive exclusion and emphasize the presumption of arbitrability, others emphasize the coverage of the arbitration clause itself in relation to the substantive claims made in the underlying grievance.[4] There also is confusion in the relationship between the obligation to arbitrate in the first place, and whether an arbitration award will be upheld as one drawing its essence from the contract.[5] *See* Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators and Parties*, 52 Va. L. Rev. 831 (1966).

This Court already has before it one aspect of the problem of who decides arbitrability in *AT&T Technologies, Inc.* v. *Communication Workers of America, Local 5090*, No. 84-1913.[6] This case presents three other aspects of that

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[3] *See* Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 Mich. L. Rev. 751, 751 (1965).

[4] *Compare Edward Hines Lumber Co.* v. *Lumber & Sawmill Workers*, 764 F.2d 631, 635 (9th Cir. 1985) *with Pacific Motor Trucking Co.* v. *Automotive Machinists*, 702 F.2d 176 (9th Cir. 1983). *Compare Haig* v. *Berberian Inc.* v. *Cannery Warehousemen*, 535 F.2d 496, 499 (9th Cir. 1976) *with Local 156, United Packing, F&A Wkrs.* v. *DuQuoin Pack. Co.*, 337 F.2d 419, 421 (7th Cir. 1964). *Compare Associated Milk Dealers, Inc.* v. *Milk Drivers Union, Local 753*, 422 F.2d 546, 550 (7th Cir. 1970) *with Desert Bottling Co.* v. *General Drivers*, 335 F.2d 198, 201 (9th Cir. 1964); *Mediterranean Enterprises, Inc.* v. *Ssangyong*, 708 F.2d 1458, 1464 (9th Cir. 1983).

[5] In this very Circuit, the Court recently has overturned an arbitration award as not drawing its essence from the contract, in a case having a far stronger substantive base than the present one. See *Hoteles Condado Beach, La Concha and Convention Center* v. *Union De Tronquistas Local 901*, 736 F.2d 34, 42 (1st Cir. 1985).

[6] In fact, in the case which this Court already has before it, *AT&T Technologies, Inc.* v. *Communication Workers of America, Local 5090*, No. 84-1913, it is reviewing the decision of the Seventh Circuit that an exception existed to the rule that the courts, not the arbitrator, determine arbitrability. The Seventh Circuit concluded that an interpretation of an express exclusion of arbitration was to be reserved for the arbitrator. *See Communication Workers of America, Local 5090* v. *Western Electric Co., Inc.*, 751 F.2d 203, 206 (7th Cir. 1984). This case, as previously shown, raises related issues, the resolution of which will have far greater significance in clarifying and advancing principles of labor arbitrability.

problem: (1) where a non-contractual past practice claim is made under a contract-based arbitration clause; (2) where contract sections are facially cited which do not on their face even remotely support the underlying claim; and (3) where the contract claims are made months too late, under a contract clause which *explicitly* bars arbitration of claims which do not satisfy the contract's prerequisites to arbitration.

Coupled with *AT&T Technologies, Inc.* v. *Communication Workers of America, Local 5090*, No. 84-1913, this case presents an excellent vehicle for deciding important questions which have created uncertainty and confusion for decades.

I. Elimination Of Uncertainty as to the Role of The Courts in Disputes Concerning Arbitrability Is of Exceptional Importance.

This case presents the important question of how the courts are to consider the threshold issue of arbitrability consistent with the fundamental principle of national labor policy that a party cannot be judicially compelled to submit a dispute to binding arbitration unless the parties have agreed to arbitrate that dispute in the first place. Section 301(a) of the Labor-Management Relations Act mandates—indeed allows—arbitration only if there is a "violation" of a contract in the refusal to do so. Determination of that is a responsibility of the courts which is not fulfilled here.

In effect, the First Circuit mandates judicial amendment of the contract, compulsory arbitration of claims which are not with the coverage of the arbitration clause, and even arbitration of claims which are explicitly barred by the Agreement. Its decision conflicts with those of the Second, Third and Seventh Circuits, and with its own prior decisions.

Its decision makes it impossible for parties to rely on a contract to govern their relations and, thus, defeats the federal policy promoting industrial peace through the collective bargaining agreement. Its decision renders meaningless the

cardinal rule that arbitration is voluntary and consensual, just as other terms of a collective bargaining agreement are voluntary and consensual. *See* 29 U.S.C. § 158(d); *Callahan* v. *General Electric Company*, 294 F.2d 60, 67 (1st Cir. 1961) (free and unfettered collective bargaining is the essence of national labor policy).

In place of stability, the First Circuit would leave uncertainty and confusion as to the law of arbitrability and the reliability of collective bargaining agreements. Elimination of the uncertainty as to the role of the courts, and resolution of the conflicts raised by this case is a matter of exceptional importance.

In the Steelworkers Trilogy, this Court articulated the emerging federal law of arbitration by delineating initially the role of a court in considering challenges to arbitral jurisdiction, so-called arbitrability. Although the Court's decisions identified some of the issues of jurisdiction which are appropriate for judicial determination, they did not determine the outside boundaries of a court's role in challenges to an arbitrator's jurisdiction. Questions concerning arbitrability of disputes as to past practice under a contract-based arbitration clause were not considered or decided. *Cf.* Elkouri & Elkouri, *How Arbitration Works* 451 (4th ed. 1985). Nor did this Court decide when, on its face, a contract governs a matter, or how the courts were to go about deciding this, considering, on the one hand, the presumption of arbitrability[7] and, on the other

[7] Although the Union will no doubt emphasize the presumption of arbitrability, the presumption is no substitute for reasoning or careful analysis of the contract, especially where, as here, arbitration is limited to contract-based claims. The presumption should not make arbitrable non-contractual claims under a contract-based arbitration clause. Nor should the presumption make alleged contract claims arbitrable where the contract sections cited do not on their face, or remotely, govern the subject matter of the underlying claim, particularly where, as here, arbitration of the alleged contract claims is barred by clear and unequivocal language of the contract. The contract expressly provides: "No grievance may be submitted to arbitration. . ." in the circumstances presented in this case. See Art. III, § 3.01, Appendix. p. A-18, *infra*. No presumption favoring arbitrability in general may overcome this explicit

hand, a limited, contract-based, arbitration clause. The Court also did not consider explicit provisions barring arbitration, as here, where the contract prerequisites are not met.

The issues presented by this case, and many others, illustrate the need for further elucidation by this Court of the role of a court in challenges to arbitrability.

It is beyond dispute that a court is prohibited from compelling arbitration of any labor dispute unless it first determines that the parties contracted to arbitrate the dispute.[8] *Warrior & Gulf Navigation Co., supra* at 582-583 (1960). Recognizing the voluntary nature of arbitration, this court stated the governing principle that:

> "Arbitration *is a matter of contract* and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit (emphasis added)."

Id. Accord, *American Manufacturing Co., supra* at 571. The Court reiterated this principle in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547 (1964). It also declared that it is the responsibility of the courts to ascertain "whether the party seeking arbitration is making a claim *which on its face* is governed by the contract (emphasis added)." *American Manufacturing Co., supra* at 568. Thus, the Court established that it is the role and function of the courts to determine arbitrability. *Accord Atkinson* v. *Sinclair Refining Company*, 370 U.S. 238, 241 (1962).

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prohibition of arbitration, even to relegate the question of arbitrability to the arbitrator. The presumption of arbitrability is, at best, an aid to interpretation. It is not a substitute for interpretation under applicable, established principles of contract interpretation.

[8] This now firmly established principle derives from the very language of Section 301(a) which "assigned the courts the duty of determining whether the reluctant party has breached his *promise* to arbitrate (emphasis added)." *Warrior & Gulf Navigation Co., supra* at 582-583.

This case is at the perimeter of these principles in several respects. The decisions by this Court do not indicate how a non-contractual past practice claim is to be dealt with under a contract-based arbitration clause; how courts are to deal with a claim that is both "frivolous" and not one "which upon its face is governed by the contract"; and how courts are to deal with failures to follow contract requirements where the contract itself expressly provides that claims which are not made in accordance with the contract prerequisites are not arbitrable. All of these issues are presented in this case, and all can be usefully resolved in the interest of resolving areas of uncertainty and sound development of the principles of arbitrability in labor relations.

Although this Court has never precluded or inhibited interpretation of contract provisions that bear directly on a judicial determination of arbitrability, there is substantial uncertainty as to the application of what this Court has said in deciding questions of arbitrability. There also is uncertainty as to where the line is to be drawn between the courts deciding arbitrability and arbitrators deciding the merits of an arbitrable dispute.[9] *See Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America*, 310 F.2d 244, 248 (9th Cir. 1962). The role of established principles of contract interpretation is in doubt.[10] This case presents three separate challenges to arbitration which are inherently intertwined with contract interpretation.

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[9] In one sense, any dispute as to arbitrability is in and of itself a dispute on the merits of the meaning and application of the contract. *Cf. Local 156, United Packinghouse, Food and Allied Workers, AFL-CIO*, v. *DuQuoin Packing Co.*, 337 F.2d 419, 421 (7th Cir. 1964).

[10] The congressional policy favoring arbitration should not relieve the court from following the general rules of contract interpretation in an effort to ascertain the intentions of the contracting parties. *See Piggly Wiggle Operators' Warehouse, Inc.* v. *Piggly Wiggly Operators' Warehouse Union*, 611 F.2d 580, 583 (5th Cir. 1980); *Faultless Division* v. *Local Lodge No. 2040 of District 153 International Association of Machinists and Aerospace Workers*, 513 F.2d 987, 990 (7th Cir. 1975); *see also Warrior & Gulf Navigation Co.*, *supra* at 589-590 (Whittaker, J., dissenting).

To determine whether the claim based purely on a past practice is arbitrable under an arbitration agreement limited to contract claims only, the court is forced at a bare minimum to examine the provisions of the Agreement to determine whether the alleged past practice is a contract-based claim, especially where, as here, numerous other past practice claims are expressly made contractual and the technicians' lounge is not. *See Minnesota Mining and Manufacturing Company* v. *Blume*, 533 F. Supp. 493, 501 (S.D. Ohio, 1978); Restatement of Contracts 2d, § 204, Comment 4 (interpretation may be necessary to determine that the parties have not agreed to a particular term); McDermott, *Arbitrability: the Courts Versus the Arbitrator*, 23 Arb. J. 18, 26-27 (1968).

To determine that the arbitration agreement is reasonably susceptible of an interpretation covering the alleged contract claims, a court must consider whether the grievance presents a *prima facie* violation of the contract.[11] *See International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Company*, 407 F.2d 253, 259 (2d Cir. 1968). In the words of *American Manufacturing Co., supra* at 568, the court must ascertain "whether the party seeking arbitration is making a claim which *on its face* is governed by the contract." If the party is not stating a claim which, "on its face is governed by the contract," the matter is not arbitrable.

Similarly, where the arbitration clause states explicitly that, if a claim is not processed in the manner required by the contract, it may not "be submitted to arbitration. . .," *see* Art. III, §3.01, Appendix, p. A-18, *infra*, the court is compelled to

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[11] *See* discussion, *infra*, p. 19. Mere allegations of contract violations are not sufficient to create a duty to arbitrate. *See Iowa Beef Processors, Inc.* v. *Amalgamated Meat Cutters*, 627 F.2d 853, 856 (8th Cir. 1980); *Independent Petroleum Workers* v. *American Oil Co.*, 324 F.2d 903, 906-907 (7th Cir. 1963).

interpret the procedural requirements of the contract to determine whether the parties have agreed to arbitrate the matter in dispute.[12] *See Wiley* v. *Livingston*, *supra*, at 557-558 (1964).

Arbitration being consensual, the courts must scrutinize the contract to determine whether there is a "violation" of the agreement to arbitrate, as a predicate for ordering arbitration in an action under § 301(a) of the Labor-Management Relations Act. This determination by the courts goes to the merits of the agreement to arbitrate, leaving for the arbitrator the merits of the dispute that the parties have agreed to arbitrate. The Court's caution as to entanglement in the merits, *Warrior & Gulf Navigation Co.*, *supra*, at 585, involves the latter, not the former, or it would swallow the basic proposition that arbitration is by consent of the parties.

This Court could not have intended that the inevitable intertwining between the merits of a grievance and arbitrability means that the courts are ousted from any inquiry into the interpretation of a contract to determine arbitrability. Yet, such is precisely the result of the First Circuit's decision. Under any view of its decision, fundamental decisions as to arbitrability will not be determined by the courts, based on the agreement of the parties, but rather, will be put to arbitrators to decide questions of arbitrability that should be decided by the courts, to decide questions on the merits which are not even arbitrable under any reasonable construction of the arbitration agreement, and to decide disputes the arbitration of which is clearly and unambiguously barred by the Agreement.

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[12] *See* discussion, *infra*, p. 23. Two commentators have written that the courts have misapprehended the holding of *Wiley* v. *Livingston*, *supra*, to bar any judicial determination regarding procedural challenges. *See* Smith & Jones, 63 Mich. L. Rev. 751, 774-776 (1965). They noted that this Court stated in *Wiley* that "a court could deny arbitration only if it could confidently be said not only that a claim was strictly 'procedural,' and therefore within the purview of the court, but also that it should operate to bar arbitration altogether." *Id.* at 775, quoting *Wiley* v. *Livingston*, *supra*, at 557-558. Here, the contract so provides, as is often the case. *See* Smith & Jones, 52 Va. L. Rev. 831, 881 (1966).

National policy recognizes the importance of arbitration. "In the United States Arbitration Act, the Labor-Management Relations Act and in numerous states, our legislative bodies have voiced their conviction that voluntary arbitration of disputes is favored and has an important role in a society which seeks the peaceful, prompt and just disposition of controversies involving our citizens." Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 Arb. J. 13, 13 (1965).

Nevertheless, however therapeutic arbitration may be, and however useful it may be as a tool of labor management relations, it has no legal basis if the parties have not agreed to it. Arbitration is not a substitute for collective bargaining. *Aluminum Co. of America* v. *International Union United Automobile Workers of America*, 630 F.2d 1340, 1344 (9th Cir. 1980).

The First Circuit's decision will result in undermining and disruption of both collective bargaining and administration of collective bargaining agreements. That this is a matter of importance is indicated by the First Circuit's order denying rehearing, which indicates that a minority of its justices would have granted it. *See* Appendix hereto, p. A-17, *infra*.

Because the First Circuit's decision raises doubt as to the consensual nature of arbitration, it is very appropriate and important for this Court to grant the writ and clarify the court's function in determining whether a dispute should be submitted to arbitration.

II. The First Circuit's Decision Conflicts With Pertinent Decisions Of Other Courts Of Appeals And With Its Own Prior Decisions.

A. *Arbitrability of Past Practice.*

The arbitrability of a non-contractual past practice under a contract-based arbitration clause has not been resolved by

this Court.[13] *Cf. Elkouri* v. *Elkouri, supra* at 451. The decision by the First Circuit here conflicts with decisions of the Second, Third and Seventh Circuit, and it is inconsistent with the Circuit's own decisions.

In *Boeing Company* v. *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW, AFL-CIO)*, 349 F.2d 412 (3d Cir. 1965), the Third Circuit held that arbitration was limited to specific provisions of the contract, that the distribution of Christmas turkeys was a past practice, and that the scope of arbitrable matters was limited to the contract. Therefore, the past practice was not arbitrable. *Id.* at 413. In a later case, the Third Circuit noted that "[d]isputes concerning such matters or practices are normally and more properly the subject of collective bargaining negotiations." *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 249* v. *Western Pennsylvania Motor Carriers Association*, 574 F.2d 783, 788 (3d Cir. 1978).

The Second Circuit also has considered the role of past practice in an agreement containing a narrow, contract-based arbitration provision.[14] *See Torrington Company* v. *Metal Products Workers*, 362 F.2d 677 (2d Cir. 1966). The facts in *Torrington, supra*, involved an arbitration clause limited to the "interpretation or application of any provision in this contract." *Id.* at 678 n.2. The basis asserted for arbitration was a past practice. *Id.* at 680. The Second Circuit stated:

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[13] The issue is not to be confused with the use of past practice as a source or aid in the interpretation of ambiguous contract provisions. *See* Restatement of Contracts 2d § 202.

[14] The Second Circuit has acknowledged the narrow parameters of contract-based arbitration agreements. In addressing a narrower arbitration clause, the Second Circuit has determined that "a court's inquiry is not so circumscribed. . ." and that it is the court's function to consider whether the conduct at issue is on its face within the purview of the clause. *Rochdale Village, Inc.* v. *Public Service Employees Union*, 605 F.2d 1290, 1295 (2d Cir. 1979). Accord, *Diamond Glass Corp.* v. *Glass Warehouse Workers and Paint Handlers, Local Union 206*, 682 F.2d 301, 303 (2d Cir. 1982).

> "In the first place. . . labor contracts generally state affirmatively what conditions the parties agree to, more specifically, what restraints the parties will place on management's freedom of action."

Id. at 681. It concluded the Union was attempting to add to the contract a benefit that had not been sufficiently vital to be part of the collective bargaining agreement. *Id.* at 682. Therefore, the Second Circuit affirmed the granting of summary judgment in favor of the company.

In another case, the Second Circuit summarized the dangers of compelling past practices to be arbitrated:

> "Such unrelated past practices and agreements could open a Pandora's Box. Phraseology so broad lays the foundation for additional disputes and leaves arbitrators without any guide posts. This no longer becomes a matter of form but becomes a matter of substance. The problem confronting the Court is not the resolution of a doubtful case in favor of arbitration but the extension of arbitrability to agreements and practices not within the scope of the present Agreement."

Proctor & Gamble Independent Union of Port Ivory, N.Y. v. *Proctor & Gamble Mfg. Co.*, 195 F. Supp. 64, 67 (E.D.N.Y. 1961), *aff'd* 298 F.2d 647 (2d Cir. 1962).

The Seventh Circuit concurs with the Second and Third Circuits. *See Chicago Web Printing Pressmen's Union, No. 7.* v. *Chicago Newspaper Publishers' Association*, 772 F.2d 384, 387 (7th Cir. 1985); *Independent Petroleum Workers of America, Inc.* v. *Standard Oil Company*, 275 F.2d 706, 709 (7th Cir. 1960). It observed that:

> "[t]o place past practice on a par with the parties' written agreement would 'create the anomaly that, while the parties expend great energy and time in negotiating the

> details of the Agreement, they unknowingly and unintentionally commit themselves to unstated and perhaps more important matters which in the future may be found to have been past practice.' "

Chicago Web Printing v. *Chicago Newspaper, supra* at 387 (quoting Elkouri & Elkouri, *How Arbitration Works*, 394 (3d ed. 1976)). *See also* H. Shulman, Umpire, Ford Motor Co.—United Automobile Workers, Opinion A-278, Sept. 4, 1952, reported at 19 Lab. Arb. 237, 242 (1952).

The First Circuit appears to be the first to order arbitration of a past practice claim which is not based on any contract language. As the First Circuit recognized in its decision, nowhere in the Agreement did the parties provide for the technicians' lounge. *See* Appendix, p. A-3, n.1 *infra*. Nor can it be claimed that, by their silence, the parties gave their consent to arbitrate existing past practices. In the Agreement, there are fifteen explicit references to continuing past practices, benefits or rights, of which eight explicitly use the term "past practice." *See* Appendix, p. A-21, *infra*. Clearly, the parties knew how to incorporate past practices into the contract. That the Agreement repeatedly incorporates numerous other past practices in provisions of the contract but makes no reference to the technicians' lounge confirms that the disputed past practice as to the technicians' lounge cannot be construed to be part of the parties' contract.

Moreover, until the First Circuit's decision in this case, the law of the Court of Appeals for the First Circuit regarding arbitrability was clear. It was the role of the courts to determine arbitrability based on the contract of the parties.[15] In

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[15] *See Local 201, International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Co.*, 262 F.2d 265, 272 (1st Cir. 1959); *Local No. 149 of the American Federation of Technical Engineers (AFL)* v. *General Electric Co.*, 250 F.2d 922, 927 (1st Cir. 1957). *Cf. Mobil Oil Corp.* v. *Local 8-766, Oil, Chemical & Atomic Workers International Union*, 600 F.2d 322, 329 (1st Cir. 1979).

fact, the First Circuit had recently reiterated the threshold requirement that the dispute must be within the parameters of the arbitration agreement in order to be arbitrable. *See International Brotherhood of Electrical Workers* v. *Freedom WLNE-TV, Inc.*, 760 F.2d 8, 10 (1st Cir. 1985) (citing with approval the Second Circuit's decision in *Rochdale Village, Inc.* v. *Public Service Employees, supra* at 1295).

The First Circuit's decision here, on the non-contractual past practice claim, presents a serious question as to its consistency with these principles. Certainty as to the law of arbitrability is of grave importance to the United States District Court, which in good faith applied the prior decisions of the First Circuit, to advisors in the area of labor management who depended on prior decisions of the First Circuit in formulating their advice, and to parties who rely on the First Circuit's decisions and are now faced with confusion and uncertainty in negotiation and administration of collective bargaining agreements.

This Court should end this potentially disruptive conflict by granting the writ and deciding whether "the agreement [is] an exclusive statement of rights and privileges or does it subsume continutation of existing conditions?" Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017, 1032 (1961). It is of considerable importance whether the Circuit's decision impairs the reliability of the collective bargaining agreement itself as an instrument governing the relations of the parties.

B. *Arbitrability of Alleged Contract Claims.*

The question raised by the alleged contract claims is controlled by the same core principles that arbitration is by, and only by, the consent of the parties and that arbitrability of a dispute is an issue for the court, not the arbitrator.

Based on these principles, prior to the First Circuit's decision in this case, both the First, Second and Eighth Circuits had held that it was the nature of the claim that established arbitrability, not mere allegations of contract claims.[16] Moreover, the Third Circuit also had indicated that arbitrability does not turn on the parties' use of words, but rather, on the nature of the dispute. *See Hahneman University* v. *District 1199C, National Union of Hospital and Health Care Employees*, 765 F.2d 38, 41 (3d Cir. 1985). *Cf.* Smith & Jones, 52 Va. L. Rev. 831, 874. These decisions are consistent with this Court's decision in *American Manufacturing Co., supra* at 568, in its explicit requirement that the claim *"on its face"* be one governed by the contract.[17]

Indeed, the First Circuit itself previously recognized the flaw that it has now adopted:

> "It would be *an abdication of our responsibilty* to hold that merely by phrasing a grievance as a request for interpretation of the contract, the union foreclosed the court from considering whether the employer agreed to submit the issue to arbitration (emphasis added)."

Camden Industries Co. v. *Carpenters Local Union No. 1688*, 353 F.2d 178, 179 (1st Cir. 1965).

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[16] *See Iowa Beef Processors, Inc.* v. *Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO*, 627 F.2d 853, 856 (8th Cir. 1980); *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *General Electric Company*, 407 F.2d 253, 259 (2d Cir. 1968); *International Union of Electrical, Radio, Machine Workers, AFL-CIO* v. *General Electric Co.*, 429 F.2d 412, 413 (1st Cir. 1970); *Camden Industries Co.* v. *Carpenters Local Union No. 1688, United Brotherhood of Carpenters and Joiners of America*, 353 F.2d 178, 179 (1st Cir. 1965); *Trailways of New England, Inc.* v. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL-CIO, Division 1318*, 353 F.2d 180, 182 (1st Cir. 1965).

[17] Although this Court has held that the arbitration clause should read "as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract." *American Manufacturing Co., supra* at 568 & n.6 (quoting Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 261 (1958)), this is subject to the corollary principle, under a contract-based arbitration clause, that the claim be one on its face governed by the contract.

This is precisely what the First Circuit has done here. The First Circuit has held that mere allegations of contract violations are sufficient to warrant submission to arbitrate without consideration, in contrast with the District Court, as to whether the claim, *on its face*, was one governed by the contract. The First Circuit, moreover, has failed to recognize the outer boundaries of the principle in that, here, WNEV-TV agreed only to arbitrate disputes relating to subject matters dealt with in the Agreement.

The arbitration clause here is limited to claims or disputes based on the contract. It sets forth a more rigorous test than mere contract allegations. It requires the court to determine whether the sections cited govern the matter in dispute. *Cf. International Union of Electrical, Radio and Machine Workers* v. *General Electric Co., supra* at 259 (test of *prima facia* arbitrability).

As the Eighth Circuit correctly noted:

> "because arbitration is a matter of contract, mere allegations of collective bargaining agreement violations are not enough to make a dispute arbitrable. If such allegations were sufficient, then 'either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.' "

Iowa Beef Processors, Inc. v. *Almalgamated Meat Cutters, supra* at 856 (quoting *Independent Petroleum Workers* v. *American Oil Co.*, 324 F.2d 903, 906-907 (7th Cir. 1963)).

As was noted by a justice of the Second Circuit in circumstances similar to here, "the claim of arbitrability has all the trappings of pure afterthought based on a strained reading of the contract." *ITT World Communications, Inc.* v. *Communications Workers of American, AFL-CIO*, 422 F.2d 77, 85 (2d Cir. 1970) (Lumbard, C.J. dissenting).

This Court's decision in *American Manufacturing Co., supra*, at 567, rejected the doctrine articulated in *International Association of Machinists* v. *Cutler-Hammer, Inc.*, 67 N.Y.S.2d 317, that, if the party's claim was not meritorious, then the meaning of the provision was beyond dispute and there was nothing to arbitrate. It stated "the agreement is to submit all grievances to arbitration, not merely those that a court may deem to be meritorious." *American Manufacturing Co., supra* at 568.

The First Circuit's decision here goes to the opposite extreme, in conflict with its own prior decisions and those of other Circuits. It would permit a party to manufacture arbitral jurisdiction merely by alleging contract violations, without scrutiny of whether the subject matter is dealt with by the contract and whether the claim on its face is governed by the contract.

There is a significant difference between a meritless claim related to a matter which the parties have dealt with in their contract and agreed to arbitrate, and a mere allegation of a contract violation to compel the arbitration of a past practice, which is not incoprorated into the contract and which no provision of the contract governs even remotely, much less on its face. The latter ignores the lack of consent of the parties to arbitrate a dispute which is non-contractual in nature and not governed on its face by any provision of the contract.

The test is not whether a claim is meritorious or frivolous, but rather, whether the dispute is within the scope of the contract. On the basis of mere allegations of contract violation, the First Circuit has submitted to arbitration a past practice claim totally outside the realm of the contract and, therefore, not within the scope of the arbitration agreement.

Indeed, the non-contractual nature of the dispute is admitted here. In the grievance procedure, the Union explicitly admitted that "The Technicians' Lounge was a benefit of employment *not* described in the Agreement (emphasis added)." R. 99.

The contract sections cited—which in any event do not on their face govern the matter in dispute—were cited only later, in a transparent effort to manufacture a basis for arbitration of a non-contractual grievance.

This Court should review the decision of the First Circuit because it undermines the voluntary basis of arbitration, encourages courts to abdicate their responsibility to determine arbitrability, and conflicts with the decisions of other Circuits and with prior decisions of this Circuit.

C. *Arbitrability of Claims Failing to Satisfy the Contract Prerequisites and Explicitly Barred by the Language of the Contract.*

This case does not raise the usual question labelled procedural arbitrability in the normal sense of that term. It raises a very different question of contractual arbitration because the parties' agreement here explicitly bars arbitration in the circumstances presented.

The contract before the Court in *Wiley* v. *Livingston*, *supra*, contained no such provision. The Court was faced with procedural questions, dependent on whether the labor agreement survived a corporate merger, but the agreement did not say whether such dispute was arbitrable. *Wiley* v. *Livingston*, *supra* at 546-547.

Here, the arbitration provisions specifically provides "No grievance may be submitted to arbitration unless it is *thus submitted* in writing. . ." Art. III, § 3.01, Appendix, p. A-18, *infra*. A "grievance is thus submitted in writing" only if the "written notice" is given within 30 days and specifies "the *sections of the contract* claimed to have been violated. . ." Art. III, § 3.01(b). Appendix, p. A-18, *infra*. It bars arbitration

explicitly if the precondition is not met.[18] If the precondition of arbitrability is not met,there is no consent to arbitrate. There is, indeed, specific agreement not to arbitrate. *See Kennecott Copper Corp.* v. *International Brotherhood of Electrical Workers, Local Union No. 1081,* 339 F.2d 343, 345 (10th Cir. 1964).

This case, with its explicit prohibition of arbitration where contract prerequisites are not met, is one that the Court alluded to in *Wiley, supra* at 557-558, as appropriate for the determination of the court because it would bar arbitration by agreement of the parties altogether.[19] Here, precisely that question is presented because the Agreement expressly provides that a grievance not "thus submitted" shall not be arbitrable.

Characterization of the matter as one of arguably "impermissible procedure. . .for the arbitrator" to determine misses the point that the substantive precondition is one which, by explicit and unambiguous agreement, must be met, and, if not met, the contract specifically provides that "no grievance may be submitted to arbitration. . . ." Precisely because the parties made the submission of the alleged contract violations in writing within 30 days a prerequisite of arbitration, whether that prerequisite is satisfied is not a "procedural" issue for the arbitrator, but rather, is an issue on which the parties are entitled to a judicial determination.

The Court, in *Wiley* v. *Livingston, supra,* did not define "procedural," and, of course, the distinction between "substance" and "procedure" depends on the context. *See Guaranty Trust Co.* v. *York,* 326 U.S. 99, 108 (1945). In relegating to the

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[18] The written grievance submitted by the Union within the appropriate time period not only did not cite any sections of the contract, but stated it was disputing solely a past practice. It was not "thus submitted." It was just as if the Union did not file a grievance at all relative to the alleged contract claims.

[19] *See* Smith & Jones, 63 Mich. L. Rev., 751, 776 & 794 (probably United States Supreme Court would reach different conclusions as to the role of courts where arbitration clause states explicitly that there is no arbitral jurisdiction over grievance not processed in the manner provided for by contract).

arbitrator, the Circuit puts form over substance and disregards the core principle that the parties may agree to arbitration in any circumstances so agreed. The parties' agreement is the controlling substantive law. For the First Circuit to label the matter "procedure" and, therefore, to hold the matter is for the arbitrator ignores this basic principle and passes the issue to the arbitrator by adopting the characterization asserted by the Union without reasoned analysis.

In an analysis critical of characterization. a commentator observered:

> "Perhaps this is what that great fallacy-hunter, Walter Wheeler Cook, had in mind when he wrote, 'The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.' "

Hancock, *The Fallacy of the Transplanted Category*, 37 Can. B. Rev. 535, 574-75 (1959). See also, Crampton & Currie, *Conflict of Laws, Characterization As a Rational Process*, 1975, pp. 94-98. Here, the label does not provide the answer. The contract does.

The First Circuit, in contradiction to a prior decision, is permitting the Union to manufacture jurisdiction and circumvent the limited consent of WNEV-TV to arbitrate only contract disputes and only those processed in accordance with the contract, arbitration of others being explicitly barred on the contract. In *International Union of Electrical, Radio, Machine Workers, and Local 286 v. General Electric Co.*, 429 F.2d 412 (1st Cir. 1970), the First Circuit denied arbitration in a situation remarkably similar to this one. In that case, the issue was whether other jobs, which had not been processed through the grievance procedure, could proceed to arbitration. The Court there stated:

> "But with respect to the additional jobs, the union cannot satisfy the clear contractual requirements for arbitration."

Id. at 414. It held that the Union "must make some showing of having satisfied the condition precedent to arbitration." *Id.* at 413.

In contrast with its prior decision, the decision of the First Circuit here, thus, allows arbitration where the contract preconditions are not met, where arbitration is explicitly barred in the agreement of the parties, and where no consent to arbitration exists. The decision also creates uncertainty as to the conclusion to the grievance procedure. A dispute may be continued indefinitely by mere citation of any contract provision at a propitious time. The absence of agreement to arbitrate becomes irrelevant. Even specific agreement not to do so, as here, is ineffective to prevent arbitration of certain disputes despite agreement of the parties.

Despite the Court's characterization in *Wiley* v. *Livingston*, *supra* at 558, of this kind of case as being rare, it occurs frequently. Commentators have noted that the issue "arise[s] with considerable frequency." Smith & Jones, 52 Va. L. Rev. 831, 881 (1966). This case is appropriate for consideration by the Court to end the uncertainty and confusion as to the necessity of consent to arbitration and the reliability of the provisions of a collective bargaining agreement explicitly barring arbitration.

Does the Agreement require arbitration, or does it not, that is the question. This is indisputably a question for the Court to determine, not the arbitrator, pursuant to the Court's jurisdiction under § 301 to determine whether or not there is a "violation" of an agreement in a party's refusal to proceed to arbitration. It is important for this Court to clarify and elucidate the controlling principles of arbitrability in order to address the inconsistency of the First Circuit's decision with these principles.

Conclusion

Despite this Court's attempts to avoid the prescription of inflexible rules for the arbitrability of collective bargaining agreements, *American Manufacturing Co., supra* at 570 (Brennan J., concurring), its principles have been interpreted by the First Circuit to be so inflexible as to create an apparent rule that arbitration is not by the consent of the parties and that the standard of arbitrability under a contract-based arbitration agreement is expanded to include all disputes, in disregard of the limited scope of the arbitration clause and also in disregard of the contract's specific prohibition of arbitration of contract-based claims that do not comply with contractual prerequisites. The decision also would have the arbitrator, rather than the court, determine the issue of arbitrability, in disregard of the contract's explicit bar of arbitration in the circumstances, and, therefore, without the contract "violation" requisite to exercise of jurisdiction under § 301(a) of the Labor-Management Relations Act.

For the reasons stated in this Petition, this Court should grant the Petition for Certiorari and give the case plenary consideration.

Respectfully submitted,

LAURENCE S. FORDHAM*
ANN E. JOHNSTON
FORDHAM & STARRETT
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300
Attorneys for Petitioner

Dated: April 7, 1986

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* Attorney of Record

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 85-1347

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,

PLAINTIFF, APPELLANT,

v.

WNEV-TV, NEW ENGLAND TELEVISION CORP.,

DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before

COFFIN, ALDRICH AND TORRUELLA,
Circuit Judges.

Joseph G. Sandulli with whom *Sandulli & Grace* was on brief for appellant.

Lawrence S. Fordham and *John D. Leubsdorf* with whom *Kilburn, Fordham & Starrett* were on brief for appellee.

November 27, 1985

TORRUELLA, *Circuit Judge.* This case is before us on appeal from a final order denying a petition to compel arbitration.

I

Appellant, International Brotherhood of Electrical Workers, Local 1228, AFL-CIO (IBEW), a labor organization that represents certain technicians employed by appellee, WNEV-TV, New England Television Corporation (WNEV-TV), brought an action against WNEV-TV pursuant to § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, seeking to compel arbitration of a dispute that IBEW alleged arose under the terms of a collective bargaining agreement in effect between IBEW and WNEV-TV. The specific grievance that IBEW sought to arbitrate was "whether [WNEV-TV] violated [the] collective bargaining agreement by eliminating an employee lounge."

The lounge in question, referred to in shop parlance as the "Technicians' Lounge," had been in existence and was used by the employees represented by IBEW from April 1982, when WNEV-TV began using its facilities, until its unilateral elimination by WNEV-TV in mid-April 1984. Prior to the removal of the lounge, IBEW tried to bring the issue before the grievance

committee, first alleging past practice[1] as basis for its position, and later pointing to various provisions in the collective bargaining agreement to support its allegations. WNEV-TV countered that the maintenance of the lounge was not required by any provision of the contract and thus the dispute could not be grieved. Upon the refusal to submit the question to arbitration by WNEV-TV, IBEW brought the present suit to compel said procedure. The district court framed the issue as "whether the Agreement requires maintenance of the Technician's Lounge." It proceeded to discuss the various contractual provisions that IBEW alleged were supportive of this requirement[2] and to conclude that, although "plaintiff's analysis appears to create an issue sufficiently substantial to

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[1] By "past practice" is meant in labor relations jargon that custom and usage of the shop have established certain acquired rights or conditions of employment. This is a provision that may be incorporated into specific contractual language. *See* Harold S. Roberts, *Roberts' Dictionary of Industrial Relations*, BMA Incorporated, Washington, D.C. (1966), p. 307. *See also* Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1500 (1959). No such specific clause exists in the present controversy, however.

[2] The district court referred to the following contract provisions as being alleged by IBEW as prohibiting elimination of the Technician's Lounge: *Recognition* (Article 1.02) (IBEW alleged that it had the right to organize and bargain, and that this employee lounge was an important element of this process; it claimed that unilateral elimination of this condition violated the right to bargain collectively); *Stewards and Inspection* (Articles 3.03 and 3.04) (IBEW claimed that the existence of the lounge was critical to the stewards' operation); *Meal Periods* (Articles 5.06 and 6.03) (IBEW claimed the lounge was a critical aspect of the meal period); *Reasonable Rules* (Article 8.05(b)) (IBEW claimed that the elimination of the lounge was not a "reasonable" rule).

require submission to an arbitrator, the contract provisions themselves do not support plaintiff's interpretation." It further concluded that "the cited articles do not create a duty to maintain a technician's lounge, even under the most liberal interpretation." The court granted summary judgment in favor of WNEV-TV. Because we conclude that the district court has over-extended itself in considering and deciding the merits of the underlying dispute, a function that is outside its powers in § 301 suits to compel arbitration, we reverse.

In the now-famous Steelworkers Triology cases the Court in *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 567-568 (1959), set out the parameters of a court's role in deciding issues of arbitrability:

> The function of the court is *very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator.* It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . .
>
> *The courts*, therefore, *have no business* weighing the merits of the grievance, considering whether there is equity in a particular claim, or *determining whether there is particular language in the written instrument which will support the claim.* The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are

> not a part of the plant environment may be quite unaware.[6]

(Emphasis supplied. Footnote 5 omitted).

In footnote 6, the court made reference to Archibald Cox's article, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt. L. Rev. 247, 261 (1958) in which he wrote:

> The typical arbitration clause is written in words which cover, without limitation, all disputes concerning the interpretation or application of a collective bargaining agreement. Its words do not restrict its scope to meritorious disputes or two-sided disputes, still less are they limited to disputes which a judge will consider two-sided. Frivolous cases are often taken, and are expected to be taken, to arbitration. What one man considers frivolous another may find meritorious, and it is common knowledge in industrial relations circles that grievance arbitration often serves as a safety valve for troublesome complaints. Under these circumstances it seems proper to read the typical arbitration clause as a promise to arbitrate every claim, meritorious or frivolous, which the complainant bases upon the contract. The objection that equity will not order a party to do a useless act is outweighed by the cathartic value of arbitrating even a frivolous grievance and by the dangers of excessive judicial intervention.

The arbitration clause here in question is precisely the type of clause referred to by Justice Douglas in *American Mfg.* and by Archibald Cox in his article. Articles 3.01 and 3.02 of the collective bargaining agreement provide for a grievance and arbitration procedure to resolve:

> *All* complaints, disputes or questions as to the interpretation, application or performance of this agreement which are not adjusted between the Employer and the representative of the Union. . . .

(Emphasis supplied). Once the district court made the threshold finding that plaintiff's claims "appear[ed] to create an issue sufficiently substantial to require submission to an arbitrator," its judicial function was at an end. When it proceeded to find that the "contract provisions themselves [did] not support plaintiff's interpretation [and that] the cited articles [did] not create a duty to maintain a technician's lounge," it entered the proscribed area of "determining whether there is particular language in the written instrument which will support the claim." *American Mfg. Co., supra*, 363 U.S. at 568. The issue as stated by the district court should not have been "whether the Agreement requires maintenance of the Technician's Lounge" but rather whether the claim is a complaint, dispute or question as to the interpretation, application or performance of the collective bargaining contract. That it unquestionably is, irrespective of what the outcome of the merits of IBEW's claim may be. Our ruling today, of course, expresses no views as to how the issues should be decided by the arbitrator. We merely resolve that, in keeping with a clearly established national labor policy favoring the arbitration of disputes, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an

interpretation that covers the asserted dispute [,d]oubts should be resolved in favor of coverage," *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth*, 105 S. Ct. 3346, 3354 (1985). Any doubts in this case, even if we were to conclude that IBEW's claims are frivolous, require that the matter be decided by an arbitrator in the first instance. *See Mobil Oil* v. *Local 8-766 Oil Chemical and Atomic Workers*, 600 F.2d 322 (1st Cir. 1979); *Camden Indus. Co.* v. *Carpenters Local 1688*, 353 F.2d 178, 180 (1st Cir. 1965). This result is in keeping with the "strong presumption favoring arbitrability." *Nolde Bros.* v. *Bakery & Confectionery Workers*, 430 U.S. 243, 254 (1976). *See also generally* Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 Va. L. Rev. 831 (1966); Smith & Jones, *The Supreme Court and Labor Dispute Arbitration: The Emerging Federal Law*, 63 Mich. L. Rev. 751 (1965); McDermott, *Arbitrability: The Courts versus the Arbitrator*, 23 Arb. J. 18 (1968); Note, *Judicial Review of Labor Arbitration Awards After the Triology*, 53 Cornell L. Rev. 136 (1967).

The company says that there are no doubts in this case because the arbitration clause permits arbitration only of grievable matters, and this one was not grievable because the grievance procedure required written specification of "the sections of the contract claimed to have been violated," and there were no sections cited, but only "past practice." It has been

held that a contract may be found to incorporate past practice even though not mentioned. *See Warrior & Gulf*, ante, at 581-82 ("industrial common law — the practice of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it."); *Edward Hines Lumber Co.* v. *Lumber & Sawmill Workers Local No. 2588*, 764 F.2d 631 (9th Cir. 1985); *Local No. 702, IBEW* v. *Central Ill. Pub. Serv. Co.*, 324 F.2d 920 (7th Cir. 1963). In *Warrior & Gulf* the Court further said, at 585, "In the absence of any express provision excluding a particular grievance from arbitration. . . only the most forceful evidence of a purpose to exclude the claim can prevail." Under this test we will not hold that the quoted provision, as a matter of law, excluded past practice from grievability.

In this case this view is reinforced by the all-inclusive language of the no strike clause. In Section 5.18 of the collective bargaining agreement IBEW has bound itself not to engage in any "work actions, strikes (whether sympathetic or otherwise), picketing, boycotting, or any other interference" against WNEV-TV. As admitted in oral argument there is no question but that this provision constitutes a waiver by IBEW, and the employees that it represents, to engage in concerted activities against WNEV-TV during the life of this agreement, including by reason of the Technician's Lounge grievance. In fact, under Section 5.18(a), WNEV-TV "may impose any disciplinary action, including discharge" upon any employee by reason of

such activities. The impact of this situation is self-evident. "There is no exception in the 'no strike' clause and none therefore should be read into the grievance clause, since one is the *quid pro quo* for the other." *American Mfg. Co., supra,* 363 U.S. at 567; *Warrior & Gulf,* 363 U.S. at 533.

II

Thus far we have been dealing with issues of substantive arbitrability, *e.g.*, whether the subject matter of the dispute is arbitrable. *See generally,* Elkouri & Elkouri, *How Arbitration Works,* Bureau of National Affairs, Inc., Washington, D.C. (1985), at pp. 212-221.

Appellee also raises an issue related to procedural arbitrability, *e.g.*, whether the procedures required by the contract to present a grievance have been properly followed. Appellee claims that the alleged contractual violation was not made within the 30-day period established by Section 3.01 of the collective bargaining contract. In view of the fact that arbitrability, vel non, must be determined initially by the court, *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1961), we might have some difficulty in thinking failure to file was a mere procedural matter for the arbitrator, *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 555-58 (1964) if the union had filed no demand of any kind within the thirty days, However, it did file within 30 days, and sometime thereafter sought to amend by adding references to various sections of the

contract. Whether these two steps constituted impermissible procedure is surely a question for the arbitrator if he decides that the original grievance phraseology was insufficient.

Reversed and remanded for action consistent with this opinion.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
NO. 84-3004-S

INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, LOCAL 1228 AFL-CIO,
PLAINTIFF,

v.

WNEV-TV,
NEW ENGLAND TELEVISION CORPORATION,
DEFENDANT

MEMORANDUM AND ORDER
April 17, 1985

SKINNER, D.J.

Plaintiff, an electrical workers' union representing certain technicians employed by defendant WNEV-TV, brought this action under § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.*, seeking to compel arbitration of an employee grievance. The issue sought to be arbitrated is "whether the [defendant] Employer violated [its] collective bargaining agreement [the 'Agreement'] by eliminating an employee lounge".

The plaintiffs here had used the lounge, referred to as the "Technicians' Lounge", from the time WNEV began using the facility in April 1982 until its elimination sometime in mid-April 1984. Upon receiving notice of the impending removal of

the lounge, the union submitted a formal grievance to WNEV stating in sum:

> Situation being grieved: Elimination of Technician Lounge. . .
> Cite Article and Section(s): Past Practice.

WNEV responded by stating that it found no violation of the Agreement. In response to WNEV's repeated refusals to acknowledge any contractual violation, the union eventually pointed out six articles of the Agreement which, they assert, require their employer to maintain the lounge. After repeated unsuccessful attempts to resolve this grievance with WNEV through the established procedures, the union brought this suit to compel arbitration. Both parties have moved for summary judgment on the basis of the Agreement and prevailing case law.

The case law outlining the role of the courts in ruling upon actions to compel arbitration is relatively straightforward. In *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the Supreme Court of the United States stated that:

> [a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

Id. at 582-583. In a companion case, the Court warned that the role of the court

> is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. . . . The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware.

United Steel Workers of America v. *American Manufacturing Co.*, 363 U.S. 564, 568 (1960).

However, these principles are limited by the rule that "[t]he duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty". *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 547 (1964).

Articles 3.01 and 3.02 of the Agreement here at issue provide for a grievance and arbitration procedure to resolve:

> All complaints, disputes or questions as to the interpretation, application, or performace of this agreement.

This language established that, at the very least, WNEV has agreed to submit those matters dealt with in the Agreement to arbitration. The issue presented thus becomes whether the Agreement requires maintenance of the Technicians' Lounge.

The parties agree that the Agreement does not expressly provide for, or even mention, the maintenance of a technicians' or employees' lounge. Plaintiff, however, argues that many of

the contract provisions imply such a duty on the part of the employer. Plaintiff has offered the following analysis of certain portions of the agreement:

1. *Recognition* Article 1.02

First, this clause established the right of the Union to organize and to bargain collectively on behalf of the employees. The Lounge was an important element of the organizing and bargaining process. The Union would meet with employees in the Lounge to prepare for bargaining or grievances. The Union would post notices there concerning employment matters.

Second, the right to bargaining collectively is violated whenever a condition of employment is unilaterally changed by the employer without bargaining.

2. *Stewards and Inspection* Articles 3.03 and 3.04

The existence of the Lounge was critical to the operation of the stewards. It was a place for meeting with employees or examining records and operations without interfering with the normal operation of the station.

3. *Meal Periods* Article 5.06 and 6.03

The Lounge was a critical aspect of the meal period, especially the Short Lunch. It was a convenient place to quickly eat a sandwich and be right back at the job. It allowed privacy and rest. The new cafeteria is not private and is not close to the work area.

4. *Reasonable Rules* Article 8.05(b)

While management has some flexibility to rearrange its operations, its rules must be "reasonable". The elimination of the Tech Lounge was not "reasonable" within the meaning of that provision.

While plaintiff's analysis appears to create an issue sufficiently substantial to require submission to an arbitrator, the contract provisions themselves do not support plaintiff's interpretation. The cited articles do not create a duty to maintain a technicians' lounge, even under the most liberal interpretation.

Moreover, § 8(c) of the Agreement expressly reserves certain rights to management:

> Subject only to any limitations expressly stated in this Agreement, the Union recognizes that the management retains the exclusive right to manage its business including but not limited to) the right to determine the methods and means by which its operations are to be carried on, to direct the work force, to conduct its operations in an effective manner, and to establish reasonable rules.

As noted earlier, the role of courts in assessing whether an employee grievance should be submitted for arbitration is to ascertain "whether the party seeking arbitration is making a claim which *on its face* is governed by the contract". *United Steel Workers* v. *American Mfg. Co.*, 363 U.S. at 568 (emphasis added). The contract provisions here at issue do not either facially or by fair implication require submission of the instant grievance issue to arbitration. *See Local 149 of the American Federation of Technical Engineers* v. *General Electric Co.*, 250 F.2d 922 (1st Cir. 1957), *cert. denied*, 356 U.S. 938 (1958).

Accordingly, defendant WNEV's motion for summary judgment is ALLOWED.

s/ WALTER JAY SKINNER
United States District Judge

United States Court of Appeals
For the First Circuit

No. 85-1347.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,

PLAINTIFF, APPELLANT,

v.

WNEV-TV, NEW ENGLAND TELEVISION CORP.,

DEFENDANT, APPELLEE.

Before

CAMPBELL, *Chief Judge*,
ALDRICH, COFFIN, BOWNES, BREYER AND TORRUELLA,
Circuit Judges.

ORDER OF COURT

Entered: January 6, 1986

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be hereby denied.

By the Court:
FRANCIS P. SCIGLIANO, *Clerk*.

[cc: Messrs. Sandulli and Fordham]

WNEV/IBEW

CONTRACT AGREEMENT

1983-86

ARTICLE III

Arbitration - Violation of Agreement - Stewards Inspection

* * *

Section 3.01: Joint Conference Committee

There shall be a Joint Conference Committee of two representing the Employer and two representing the unit covered by this Agreement. All complaints, disputes or questions as to the interpretation, application, or performance of this Agreement which are not adjusted between the Employer and the representative of the Union shall be referred to this Committee. The Joint Committee shall meet within three (3) days after notice of such meeting is given in writing by either party. Such written notice shall specify:

(a) a brief statement of the facts alleged as constituting the grievance,

(b) the sections of the contract claimed to have been violated and,

(c) the remedy requested.

No grievance may be submitted to arbitration unless it is thus submitted in writing within thirty (30) days of the occurrence of the facts alleged as constituting the grievance. Not more than one grievance at one time may be sumbitted [sic] to arbitration for decision by the same arbiter, except where two or more grievances have common issues of facts or contract interpretation.

WNEV/IBEW

CONTRACT AGREEMENT

1983-86

ARTICLE III

Arbitration - Violation of Agreement - Stewards Inspection

* * *

Section 3.02: Arbitration

Should the Joint Committee fail to adjust the matter brought before it within three (3) working days, or such further period of time as it may agree upon, after full submission of the same, a representative of the Employer and a representative of the Union shall select an impartial arbiter. If the parties are unable to agree upon the selection of an impartial arbiter within two (2) weeks, the American Arbitration Association shall be requested to select the impartial arbiter at the earliest possible time.

The arbiter shall then consider the dispute or grievance and shall render a decision within two weeks of the date of the closing hearing. However, failure to make such an award within the two (2) weeks shall not invalidate such a decision. This decision shall be final and binding upon both the Employer and the Union. The arbiter shall have the power only to interpret the provisions of this Agreement. He shall not have the power to add or detract from or in any way change the provisions of this Agreement.

Each party shall bear the expense of preparation and presentation of his/her own case. The cost of the services and expenses of the arbiter shall be borne by the losing party.

Failure to submit to arbitration as provided in this Article shall be considered a breach of this Agreement.

WNEV/IBEW

CONTRACT AGREEMENT

1983-86

ARTICLE VIII

Miscellaneous

* * *

Section 8.05: Responsibility of the Parties

The parties recognize that, under this Agreement, each of them has responsibilities:

* * *

(c) Subject only to any limitations expressly stated in this Agreement, the Union recognizes that the management retains the exclusive right to manage its business including but not limited to) [sic] the right to determine the methods and means by which its operations are to be carried on, to direct the work force, to conduct its operations in an effective manner, and to establish reasonable rules.

WNEV/IBEW

CONTRACT AGREEMENT

1983-86

REFERENCES TO SPECIFIC PAST PRACTICES

Sec. 1.03	– "as done in the past"
Sec. 1.03(i)	– "those kinds of assignments that they have generally covered in the past"
Sec. 1.03(k)	– "past practice shall prevail"
Sec. 1.03(n)(iii)	– "in accordance with past practice"
Sec. 1.03(q)	– "past practice"; "such past practice"
Sec. 5.11(a)	– "mileage in accordance with Company policy"
Sec. 5.13	– "in accordance with the employer's sick leave policy for non-union employees"
Sec. 5.26	– "in accordance with the prevailing Company policy"
Sec. 5.28	– "in accordance with the Company policy"
Sec. 6.02(k)	– "right to continue its practices"
Sec. 6.05(a)	– "in accordance with Company policy"
Sec. 8.03	– "in accordance with Company policy"
Sec. 8.05	– "management retains the exclusive right to manage its business including...the right to determine the methods and means by which its operations are to be carried on, to direct the work force, to conduct its operations in an effective manner, and to establish reasonable rules"
Signature page	– "continuing policy of equal employment opportunity"; "to continue positive efforts"
letter of August 22, 1983, ¶11	– "continue to be Company's intent to release Employees" early on six specified days

Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1651

In the Supreme Court of the United States

OCTOBER TERM, 1985

WNEV-TV, NEW ENGLAND TELEVISION CORP.,
PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LAURENCE S. FORDHAM, P.C.*
ANN E. JOHNSTON
FORDHAM & STARRETT
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300
Attorneys for Petitioner

* Attorney of Record

Blanchard Press, Inc., Boston, Mass.—Law Printers [617] 426-6690

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In the
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1651

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Statement of the Case

On April 7, 1986, the petitioner, WNEV-TV, New England Television Corp. ("WNEV-TV") filed its Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit (the "Petition"). Also on April 7, 1986, the Court decided a related case, *AT&T Technologies, Inc.* v. *Communications Workers of America*, No. 84-1913, reported at 54 U.S.L.W. 4339 (April 8, 1986) (hereinafter referred to as "*AT&T*"). For the convenience of the Court, this decision is reprinted in the Appendix hereto. Appendix, p. A-3. WNEV-TV submits this supplement, pursuant to F.R. App. P. 22.6, to

address the relationship between this Court's decision in *AT&T* and the Petition herein.

In its Petition, WNEV-TV suggested that this case, coupled with *AT&T*, presented an excellent vehicle for deciding important questions concerning arbitrability which have created uncertainty and confusion for decades. Petition at 8-9. This remains so.

In addition, this case now presents for resolution by this Court a conflict, at least in principle, that exists between this Court's decision in *AT&T* and the First Circuit's decision in this case, reported at 778 F.2d 46 (1985)[1], as well as important and recurrent aspects of the application of the principles reaffirmed by the Court in *AT&T*.

This Court should grant certiorari to end the conflict and inconsistency that exists between the principles reaffirmed by this Court in *AT&T* and those applied by the First Circuit, and to settle vexing issues of application that repeatedly confront the courts in their attempts to apply these principles in such commonplace, garden variety circumstances as are presented in this case. Resolution of the issues presented in this case will provide guidance as to the proper application of the principles unanimously reaffirmed by this Court in *AT&T* and will advance significantly the clarity and understanding of the law of arbitrability.

Argument

In its recent decision in *AT&T*, this Court declined the invitation to adopt new standards by which to determine arbitrability. In a very succinct sequence, the Court reiterated the precepts of the *Steelworkers Trilogy:*

> "The first principle gleaned from the Trilogy is that 'arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'"
>
> * * *

[1] The First Circuit's decision is reprinted in the Petition, Appendix, p. A-1

> "The second rule . . . is that the question of arbitrability . . . is undeniably an issue for judicial determination."
>
> * * *
>
> "The third principle derived from our prior cases is that . . . a court is not to rule on the potential merits of the underlying claims."
>
> * * *

AT&T, at 4341 (citations omitted). Fourth, "there is a presumption of arbitrability in the sense that" arbitration "'should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" This may occur by "'any express provision excluding a particular grievance from arbitration,'" or by "'the most forceful evidence of a purpose to exclude the claim from arbitration . . . .'"

However, the presumption does not empower an arbitrator:

> "'to impose obligations outside the contract limited only by his understanding and conscience.' This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties."

AT&T, at 4341 (citations omitted).

Despite the Court's clear reaffirmation of these principles, the First Circuit's decision here demonstrates that confusion and uncertainty continue to exist concerning their application by the courts.

A. THE ALLEGED CONTRACT CLAIMS.

As in *AT&T*, the First Circuit in this case referred a question of arbitrability to the arbitrator even though the underlying contract contains the following "express provision excluding. . . arbitration" (*AT&T*, at 4341):

> "No grievance may be submitted to arbitration unless it is *thus submitted* in writing within thirty (30) days of the occurrence of the facts alleged as constituting the grievance."

Art. III, § 3.01 (emphasis added); Petition, Appendix, p. A-18. In order to be "thus submitted," written notice must be filed "within thirty (30) days of the occurrence", and "shall specify:

> (a) a brief statement of the facts alleged as constituting the grievance,
> (b) the *sections of the contract* claimed to have been violated, and
> (c) the remedy requested."

Art. III, § 3.01 (emphasis added); Petition, Appendix, p. A-18.

Because Respondent's grievance was submitted many months after the 30-day limitation period had expired, arbitration of those claims is barred by "an express provision excluding. . . [them] from arbitration. . . ." *AT&T*, at 4341. In *AT&T*, it was claims concerning layoffs for lack of work which allegedly were not arbitrable. Here, it is Respondent's failure to follow an obligatory contract process which explicitly bars arbitration. As respects the agreement of the parties to arbitrate in the two cases and who decides the question of arbitrability in the two cases, there is no difference. Yet, in this case the First Circuit did not consider and decide whether there was agreement to arbitrate. Instead, as the Seventh Circuit did in *AT&T*, the court put this question to the arbitrator, despite the presence of an "express provision excluding. . . [the] griev-

ance from arbitration." *AT&T*, at 4341 (quoting *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584-585 (1960)).

The First Circuit's dicision thus violates the first and second principles set forth in *AT&T*, and the corollary of the fourth, requiring judicial enforcement of "any express provision excluding a particular grievance from arbitration." *Id.* The question here is not even one of a court disregarding "forceful evidence of a purpose to exclude the claim from arbitration," but rather, is a question of a court disregarding an "express provision excluding a particular grievance from arbitration...." *AT&T*, at 4341. The First Circuit's referral of the arbitrability of the contract claims to the arbitrator disregards the principles that arbitration "is a matter of contract," and that "inexorably...the question of arbitrability...is undeniably an issue for judicial determination." *AT&T*, at 4341.

Thus, as to the alleged contract claims, in addition to the reasons presented in the Petition for granting the Writ, there is also a serious question of inconsistency of the First Circuit's decision with the principles of *AT&T*, if not a clear violation of those principles.

B. The Past Practice Claim.

Similar problems exist in this case with respect to the past practice claim, under an arbitration clause confined to issues "as to the interpretation, application or performance of this Agreement." Art. III, § 3.01; Petition, Appendix, p. A-18. The First Circuit's decision also remits to arbitration a non-contractual past practice claim under a contract-based arbitration clause, in violation of "the First principle gleaned from the *Trilogy*...," that "arbitration is a matter of contract," and the corollary principle that denies to arbitrators the power "to impose obligations outside the contract limited only by his understanding and conscience." *AT&T*, at 4341.

Here, there is no question that the past practice claim is non-contractual. The Respondent Union so admitted in two grievance submissions. For the convenience of the Court, these are reprinted in the Appendix hereto. Appendix, pp. A-1, A-2. The First Circuit also recognized that there is no provision in the Agreement concerning the past practice. Petition, Appendix, p. A-3, n. 2.

The past practice claim is, therefore, inherently beyond the scope of the arbitration clause which is limited to contract-based claims. Enforcement of this basic limitation inexorably bars arbitration of a non-contractual past practice claim, as the Second, Third and Seventh Circuits have held. Petition, pp. 16-18. Moreover, this limitation is confirmed by the presence of *fifteen* provisions in the contract specifically incorporating other past practices, and the absence of a single provision incorporating the past practice involved in this case, as the First Circuit's decision acknowledges. The limitation to contract-based claims also is confirmed by the management rights clause, reserving to the station "the exclusive right to manage its business," "[s]ubject only to any limitations expressly stated in this Agreement. . . ." There are no such limitations in the Agreement. Petition, Appendix, pp. A-20, A-21.

Arbitration of a non-contractual past practice claim enables the arbitrator to dispense his own brand of industrial justice, contrary to *AT&T* principles, and in disregard of contractual limitations on his authority as described by this Court in its "first principle." *AT&T*, at 4341. As this Court made very clear in *AT&T*, such a result is not acceptable. As the Court stated:

> "This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective bargaining agreements and is antithetical to the function of a collective bargaining agreement as setting out the rights and duties of the parties."

Id. at 4341. Under the second principle, enforcement of the explicit limitation to claims "as to the interpretation, application or performance of this Agreement" (Petition, Appendix, p. A-18) are "inexorably...for judicial determination." *AT&T*, at 4341. The First Circuit has not done so here, nullifying the express limitation to contract-based claims, and enabling the arbitrator "to impose obligations outside the contract...." *AT&T*, at 4341.

Thus, the First Circuit's disposition of the non-contractual past practice claim, under a contract-based arbitration clause, also presents a serious question of inconsistency of the First Circuit with the *AT&T* principles, if not clear conflict with them. This presents a further reason for granting the Writ, in addition to those presented in the Petition.

The principles stated in *AT&T*, and the conflicts, inconsistencies and difficulties in the application of these principles by the courts, are the foundation of the Petition. The questions here presented are important and demonstrate the difficulty of courts in applying these controlling principles in routine, commonplace situations.

This case presents an excellent opportunity, following on the heels of *AT&T*, to resolve recurrent questions of consistency with established principles first enumerated twenty-five years ago and reaffirmed in *AT&T*, and to resolve conflicts, inconsistencies and difficulties in their application, both internal to the First Circuit and between the decision of the First Circuit and those of other courts of appeals, all as described more fully in the Petition.[2]

---

[2] Problems similar to those presented by the past practice claim are presented by an alternate issue as to the contract claims. The sections of the contract cited do not on their face, or remotely, support the claim. The District Court thus held, following *United Steelworkers* v. *American Manufacturing Co.*, 376 U.S. 564, 568 (1960), that it is the responsibility of the courts to ascertain "whether the party seeking arbitration is making a claim which *on its face* is governed by the contract." (Emphasis added). The District Court further held that the Union's claim was not governed by the contract "either facially or by fair implication...." Petition, Appendix thereto, p. A-15. The

Conclusion

The Writ should be granted for the reasons stated in the Petition and, as further demonstrated in this supplement thereto, in order to determine the consistency of the First Circuit's decision with the principles reaffirmed in *AT&T*.

Respectfully submitted,

LAURENCE S. FORDHAM, P.C.*
ANN E. JOHNSTON
FORDHAM & STARRETT
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300
Attorneys for Petitioner

DATED: April 24, 1986

* Attorney of Record

First Circuit held otherwise, but a prior decision of the First Circuit, and decisions by the Second and Eighth Circuits are to the contrary. Petition, pp. 19-21. Mere contract allegations, if sufficient to obtain arbitration, undercut the first principle, enable arbitrators "to impose obligations outside the contract," and are "antithetical to the function of a collective bargaining agreement as setting out the rights and duties of the parties." *AT&T*, at 4341. The issue is a vexing one. Some courts emphasize these principles in deciding questions of arbitrability. Others emphasize the third and fourth principles and readily order arbitration without recognition of the countervailing principles noted by the Court in *AT&T*. However, it should be noted that this particular issue, decided differently by the two courts below, is not reached in this case if there is judicial enforcement of the following "express provision" of the contract:

> "No grievance may be submitted to arbitration unless it is thus submitted in writing within thirty (30) days. . . ."

A-1

Revised 7/10/87 B

IBEW Local 1228 Grievance Form

GWP
Grievance No.
B-44-3.1

(Complete as fully as possible, send original to the Business Manager for files, and keep one in steward's file. Other copies may be for grievant and/or Company.)

Please print clearly

Date of Grievance 4-9-84 Employer WNEV-TV

Agreement Violated WNEV / IBEW CONTRACT 83-86

Article(s) and Section(s): PAST PRACTISE

Form Completed by Phyllis McAleer / Harry Weinstein

Cite Article and Section(s): PAST PRACTISE

Situation Being Grieved: ELIMINATION OF TECHNICIAN LOUNGE ON 2ND FLOOR; CHANGE IN WORKING CONDITIONS; A TECHNICIAN'S LOUNGE HAS BEEN IN EXISTENCE SINCE OCCUPANCY OF BLDG.

Settlement Requested:

Date Company Notified of Grievance: 4-9-84 ☒ Written ☐ Verbal

Informal Meeting Held: Last Date for a Formal Meeting:

Formal Meeting Held: Last Date Arbitration can be requested:

Written Request for Arbitration Sent: 097

Date of Arbitration Hearing: Grievance Number:

BEST AVAILABLE COPY

BEST AVAILABLE COPY

A-2

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
Local 1228

April 19, 1984

Mr. Joseph Pickering
WNEV-TV
7 Bulfinch Place
Boston, MA 02114

Dear Joe,

I am in receipt of your letter of April 18, 1984, in regards to the Union's grievance of April 9, 1984, on the unilateral elimination of the Technicians' Lounge at WNEV-TV. Since the Company seems unwilling to process the grievance as submitted, please consider this letter formal notification to New England Television, Inc., that the Union desires to bargain with the Company about the issue of the Technicians' Lounge as soon as mutually acceptable dates for such bargaining meetings can be agreed to. The Union hereby proposes that the Technicians' Lounge, which was located on the second floor, be relocated to a mutually acceptable site within the building, and that such relocated Lounge provide not less than the same space and facilities provided in the previous Lounge.

There has been a Technicians' Lounge at 7 Bulfinch Place as long as there has been a television station located therein. The Technicians' Lounge was a benefit of employment not described in the Agreement, but, by past practice, it has always been provided to Technicians. There is no argument with the Company that the Company has a right to relocate the Lounge to a mutually acceptable location elsewhere in the building. There can be no argument that the Company has adequate space to continue to provide the Lounge, since it was provided in the past by New England Television when there were more employees, and when the fourth floor was leased to R.K.O. General, Inc. The elimination of the Technicians' Lounge by the Company without providing acceptable replacement facilities seems to reflect a change in attitude by the Company toward the Technicians, a change also reflected in the Company's failure to provide for the Technicians during the recent blizzard, which I wrote to you about.

Should the Company be willing to process the grievance filed on April 9, 1984, then the Union hereby requests, under Section 3.01, that the Joint Conference Committee meet to discuss the grievance as soon as a mutually acceptable date can be scheduled. In addition, the Union hereby notifies the Company of its desire, under Section 3.02 of the Agreement, to arbitrate the grievance.

Yours truly,

Kenneth F. Flanagan
Business Manager

Certified Mail No. P277-491-833
Return Receipt Requested

cc: Steve Hassan
Phyllis McHugh

Kenneth F. Flanagan Business Manager
1494 Walnut St., Newton Highlands, MA 02161-1284 (617) 964-4450

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APPENDIX

BNA SEAL *The United States* **LAW WEEK** Supreme Court Opinions

April 8, 1986 • The Bureau of National Affairs, Inc., Washington, D.C. • Vol. 54, No. 39

OPINIONS ANNOUNCED APRIL 7, 1986

The Supreme Court decided:

No. 84-1913

AT&T TECHNOLOGIES, INC., PETITIONER *v.* COMMUNICATIONS WORKERS OF AMERICA ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Syllabus

No. 84-1913. Argued January 22, 1986—Decided April 7, 1986

WHITE, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which BURGER, C. J., and MARSHALL, J., joined.

JUSTICE WHITE delivered the opinion of the Court.

The issue presented in this case is whether a court asked to order arbitration of a grievance filed under a collective bargaining agreement must first determine that the parties intended to arbitrate the dispute, or whether that determination is properly left to the arbitrator.

I

AT&T Technologies, Inc. (AT&T or the Company) and the Communications Workers of America (the Union) are parties to a collective-bargaining agreement which covers telephone equipment installation workers. Article 8 of this agreement

establishes that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" must be referred to a mutually agreeable arbitrator upon the written demand of either party. This Article expressly does not cover disputes "excluded from arbitration by other provisions of this contract."[1] Article 9 provides that, "subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause," AT&T is free to exercise certain management functions, including the hiring and placement of employees and the termination of employment.[2] "When lack of work necessitates Layoff," Article 20 prescribes the order in which employees are to be laid off.[3]

On September 17, 1981, the Union filed a grievance challenging AT&T's decision to lay off 79 installers from its Chicago base location. The Union claimed that, because there

---

[1] Article 8 provides, in pertinent part, as follows:

> "If the National and the Company fails to settle by negotiation any differences arising with respect to the interprettion of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedure as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties." App. 21.

[2] Article 9 states:

> "The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of work." *Id.*, at 22.

[3] Article 20 provides, in pertinent part, "[w]hen lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Term of Employment and by Layoff groups as set forth in the following [subparagraphs stating the order of layoff]." *Id.*, at 23. Article 1.11 defines the term "Layoff" to mean "a termination of employment arising out of a reduction in the force due to lack of work." *Id.*, at 20.

was no lack of work at the Chicago location, the planned layoffs would violate Article 20 of the agreement. Eight days later, however, AT&T laid off all 79 workers, and soon thereafter, the Company transferred approximately the same number of installers from base locations in Indiana and Wisconsin to the Chicago base. AT&T refused to submit the grievance to arbitration on the ground that under Article 9, the Company's decision to lay off workers when it determines that a lack of work exists in a facility is not arbitrable.

The Union then sought to compel arbitration by filing suit in federal court pursuant to § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a).[4] *Communications Workers of America* v. *Western Electric Co.*, No. 82 C 772 (ND Ill., Nov. 18, 1983). Ruling on cross-motions for summary judgment, the District Court reviewed the provisions of Articles 8, 9, and 20, and set forth the parties' arguments as follows:

> "Plaintiffs interpret Article 20 to require that there be an actual lack of work prior to employee layoffs and argue that there was no such lack of work in this case. Under plaintiffs' interpretation, Article 20 would allow the union to take to arbitration the threshold issue of whether the layoffs were justified by a lack of work. Defendant interprets Article 20 as merely providing a sequence for any layoffs which management, in its exclusive judgment, determines are necessary. Under defendant's interpretation, Article 20 would not allow for an arbitrator to decide whether the layoffs were warranted by a lack of work but only whether the company followed the proper order in laying off employees." App. tp Pet. for Cert. 10A.

---

[4] Section 301(a), 61 Stat. 156, 29 U.S.C. § 185(a) states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Finding that "the union's interpretation of Article 20 was at least 'arguable,' " the court held that it was "for the arbitrator, not the court to decide whether the union's interpretation has merit," and accordingly, ordered the Company to arbitrate. *Id.*, at 11A.

The Court of Appeals for the Seventh Circuit affirmed. *Communications Workers of America* v. *Western Electric Co.*, 751 F. 2d 203 (1984). The Court of Appeals understood the District Court to have ordered arbitration of the threshold issue of arbitrability. *Id.*, at 205, n. 4. The court acknowledged the "general rule" that the issue of arbitrability is for the courts to decide unless the parties stipulate otherwise, but noted that this Court's decisions in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), and *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960), caution courts to avoid becoming entangled in the merits of a labor dispute under the guise of deciding arbitrability. From this observation, the court announced an "exception" to the general rule, under which "a court should compel arbitration of the arbitrability issue where the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute." 751 F. 2d, at 206.

All of these factors were present in this case. Article 8 was a "standard arbitration clause," and there was "no clear, unambiguous exclusion from arbitration of terminations predicated by a lack of work determination." *Id.*, at 206-207. Moreover, although there were "colorable arguments" on both sides of the exclusion issue, if the court were to decide this question it would have to interpret not only Article 8, but Articles 9 and 20 as well, both of which are "substantive provisions of the Agreement." The court thus "decline[d] the invitation to decide arbitrability," and ordered AT&T "to arbitrate the arbitrability issue." *Id.*, at 207.

The court admitted that its exception was "difficult to reconcile with the Supreme Court's discussion of a court's duty to decide arbitrability in [*John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964)]." The court asserted, however, that the discussion was "dicta," and that this Court had reopened the issue in *Nolde Brothers, Inc.* v. *Bakery Workers*, 430 U.S. 243, 255, n. 8 (1977). 751 F. 2d, at 206.

We granted certiorari, 474 U.S. ____ (1985), and now vacate the Seventh Circuit's decision and remand for a determination of whether the Company is required to arbitrate the Union's grievance.

II

The principles necessary to decide this case are not new. They were set out by this Court over 25 years ago in a series of cases known as the *Steelworkers Trilogy: Steelworkers* v. *American Mfg. Co., supra; Steelworkers* v. *Warrior & Gulf Navigation Co., supra;* and *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

The first principle gleaned from the *Trilogy* is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf, supra,* at 582; *American Mfg. Co., supra,* at 570-571 (BRENNAN, J., concurring). This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration. *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 374 (1974).

The second rule, which follows inexorably from the first, is that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. *Warrior & Gulf, supra*, at 582-583. See *Operating Engineers* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972); *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 241 (1962), overruled in part on other grounds, *Boys Markets, Inc.* v. *Retail Clerks*, 398 U.S. 235 (1970). Accord, *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.* 473 U.S.____, ____(1985).

The Court expressly reaffirmed this principle in *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543 (1964). The "threshold question" there was whether the court or an arbitrator should decide if arbitration provisions in a collective-bargaining contract survived a corporate merger so as to bind the surviving corporation. *Id.*, at 546. The Court answered that there was "no doubt" that this question was for the courts. "Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.'. . . The duty to arbitrate being of contractual orgin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id.*, at 546-547 (citations omitted).

The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked

to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *American Mfg. Co.*, 363 U.S., at 568 (footnote omitted).

Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, 363 U.S., at 582-583. See also *Gateway Coal Co.* v. *Mine Workers*, *supra*, at 377-378. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder. . . ." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf*, *supra*, at 584-585.

This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective bargaining agreements, "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." *Schneider Moving & Storage Co.* v. *Robbins*, 466 U.S. 364, 371-372 (1984) (citation omitted). See *Gateway Coal Co.*, *supra*, at 378-379. The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced,"

however, if a labor arbitrator had the "power to determine his own jurisdiction. . . ." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." *Ibid.* This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective-bargaining agreement as setting out the rights and duties of the parties.

With these principles in mind, it is evident that the Seventh Circuit erred in ordering the parties to arbitrate the arbitrability question. It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.

The Union does not contest the application of these principles to the present case. Instead, it urges the Court to examine the specific provisions of the agreement for itself and to affirm the Court of Appeals on the ground that the parties had agreed to arbitrate the dispute over the layoffs at issue here. But it is usually not our function in the first instance to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to be subject to arbitration. The issue in the case is whether, because of express exclusion or other forceful evidence, the dispute over the interpretation of Article 20 of the contract,

the layoff provision, is not subject to the arbitration clause. That issue should have been decided by the District Court and reviewed by the Court of Appeals; it should not have been referred to the arbitrator.

The judgment of the Court of Appeals is vacated, and the case is remanded for proceedings in conformity with this opinion.

It is ordered.

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE MARSHALL join, concurring.

I join the Court's opinion and write separately only to supplement what has been said in order to avoid any misunderstanding on remand and in future cases.

The Seventh Circuit's erroneous conclusion that the arbitrator should decide whether this dispute is arbitrable resulted from that court's confusion respecting the "arbitrability" determination that we have held must be judicially made. Despite recognizing that Article 8 of the collective-bargaining agreement "is a standard arbitration clause, providing for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder,'" and that "there is no clear, unambiguous exclusion [of this dispute] from arbitration," the Court of Appeals thought that "there [were] colorable arguments both for and against exclusion." *Communications Workers of America* v. *Western Electric Co.*, 751 F.2d 203, 206-207 (CA7 1984). The "colorable arguments" referred to by the Court of Appeals were the parties' claims concerning the meaning of Articles 9 and 20 of the collective-bargaining agreement: the Court of Appeals thought that if the Union's interpretation of Article 20 was correct and management could not order lay-offs for reasons other than lack of work, the dispute was arbitrable; but if AT&T's interpretation of Article 20 was correct and management was free to order lay-offs for other reasons, the dispute was not arbitrable under Article 9. *Id.*, at 207. Because

these were the very issues that would be presented to the arbitrator if the dispute was held to be arbitrable, the court reasoned that "determining arbitrability would enmesh a court in the merits of th[e] dispute," *ibid.*, and concluded that the arbitrability issue should be submitted to the arbitrator.

The Court of Appeals was mistaken insofar as it thought that determining arbitrability required resolution of the parties' dispute with respect to the meaning of Articles 9 and 20 of the collective-bargaining agreement. This is clear from our opinion in *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). In *Warrior & Gulf*, the Union challenged management's contracting out of labor that had previously been performed by Company employees. The parties failed to resolve the dispute through grievance procedures, and the Union requested arbitration; the Company refused, and the Union sued to compel arbitration under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The collective-bargaining agreement contained a standard arbitration clause similar to Article 8 of the AT&T/CWA contract, i.e., providing for arbitration of all differences with respect to the meaning or application of the contract. We held that, in light of the congressional policy making arbitration the favored method of dispute resolution, such a provision requires arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf, supra*, at 582-583 (footnote omitted).

The Company in *Warrior & Gulf* relied for its argument that the dispute was not arbitrable on a "Management Functions" clause which, like Article 9 of the AT&T/CWA agreement, excluded "matters which are strictly a function of management," 363 U.S., at 576, from the arbitration provision. We recognized that such a clause "might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to

indulge." *Id.* at 584. However, we also recognized that to read the clause this way would make arbitrability in every case depend upon whether management could take the action challenged by the Union; the arbitrability of every dispute would turn upon a resolution of the merits, and "the arbitration clause would be swallowed up by the exception." *Ibid.* Therefore, we held that, where a collective-bargaining agreement contains a standard arbitration clause and the "exception" found in the Management Functions clause is general, "judicial inquiry . . . should be limited to the search for an explicit provision which brings the grievance under the cover of the [Management Functions] clause . . . ." *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 572 (1960) (BRENNAN, J., concurring); *Warrior & Gulf*, *supra*, at 584. "In the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . ." 363 U.S., at 584-585.

The Seventh Circuit misunderstood these rules of contract construction and did precisely what we disapproved of in *Warrior & Gulf*—it read Article 9, a general Management Functions clause, to make arbitrability depend upon the merits of the parties' dispute. As *Warrior & Gulf* makes clear, the judicial inquiry required to determine arbitrability is much simpler. The parties' dispute concerns whether Article 20 of the collective-bargaining agreement limits management's authority to order lay-offs for reasons other than lack of work. The question for the court is "strictly confined," *id.*, at 582, to whether the parties agreed to submit disputes over the meaning of Article 20 to arbitration. Because the collective-bargaining agreement contains a standard arbitration clause, the answer must be affirmative unless the contract contains explicit language stating that disputes respecting Article 20 are not subject to arbitration, or unless the party opposing arbitration—here AT&T—adduces "the most forceful evidence" to

this effect from the bargaining history. Under *Warrior & Gulf*, determining arbitrability does not require the court even to consider which party is correct with respect to the meaning of Article 20.

The Court remands this case so that the court below may apply the proper standard to determine arbitrability. The Court states that "it is usually not our function in the first instance to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to be subject to arbitration." *Ante*, at 8. Of course, we have on numerous occasions construed collective-bargaining agreements "in the first instance"; we did so, for example, in the three cases comprising the *Steelworker Trilogy*. See also, *John Wiley & Sons, Inc.* v. *Livingston*, 376 U.S. 543, 552-555 (1964); *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247, 249-253 (1964). Nonetheless, I agree with the Court that we should interpret a collective-bargaining agreement only where there is some special reason to do so. Thus, it is appropriate for this Court to construe a collective-bargaining agreement where—as in the *Steelworkers Trilogy*—our decision announces a new principle of law, since applying this principle may help to clarify our meaning. There is no such need, however, where—as here— we simply reaffirm established principles. Moreover, since the determination left for the Court of Appeals on remand is straightforward and will require little time or effort, concerns for efficient judicial administration do not require us to interpret the agreement. Finally, because the parties have submitted to us only fragmentary pieces of the bargaining history, we are not in a position properly to evaluate whether there is "the most forceful evidence" that the parties did not intend for this dispute to be arbitrable. Therefore, I join the Court's opinion and concur in the Court's judgment remanding to the Court of Appeals.

REX E. LEE, Washington, D.C. (DAVID W. CARPENTER, GERALD D. SKONING, CHARLES C. JACKSON, JEFFREY S. HELLER, HOWARD J. TRIENENS, ALFRED A. GREEN, JOSEPH RAMIREZ, ROBERT W. BENSON, JUANITA G. DE ROOS, SIDLEY & AUSTIN, and **Seyfarth, Shaw, Fairweather & Geraldson**, with him on the brief) for petitioner; LAURENCE GOLD, Washington, D.C. (IRVING M. FRIEDMAN, STANLEY EISENSTEIN, HAROLD A. KATZ, DAVID SILBERMAN, and JAMES COPPESS, with him on the brief) for respondents.

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1651

In the Supreme Court of the United States

OCTOBER TERM, 1985

WNEV-TV, NEW ENGLAND TELEVISION CORP.,
PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

SECOND SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

LAURENCE S. FORDHAM, P.C.*
ANN E. JOHNSTON
FORDHAM & STARRETT
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300
Attorneys for Petitioner

* Attorney of Record

Blanchard Press, Inc., Boston, Mass.—Law Printers [617] 426-6690

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In the
Supreme Court of the United States

OCTOBER TERM, 1985

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v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

SECOND SUPPLEMENTAL BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Statement of the Case

On April 24, 1986, the petitioner, WNEV-TV, New England Television Corp. ("WNEV-TV") filed its Supplemental Brief to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit. Its Petition was filed on April 7, 1986. WNEV-TV submitted the supplement, pursuant to Fed. R. App. P. 22.6, to address the relationship between this Court's recent decision in *AT&T Technologies, Inc.* v. *Communications Workers of America*, No. 84-1913, reported at 54 U.S.L.W. 4339 (April 8, 1986) (hereinafter referred to as "*AT&T*")[1] and the Petition of WNEV-TV.

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[1] The Court's decision in *AT&T* is reprinted in the Supplemental Brief Appendix, p. A-3.

The necessity for this second supplement arose because on April 22, 1986, in another related matter, *Royal Center, Inc.* v. *Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226*, No. 85-299 (hereinafter referred to as "*Royal*"), this Court granted the petition for a writ of certiorari, vacated judgment and remanded for further consideration. Petitioner submits this second supplement in satisfaction of its duty to this Court, pursuant to Fed. R. App. P. 22.6, to call attention to its decision in *Royal* and to address the relationship between the action taken by this Court in *Royal* and the Petition of WNEV-TV. *See Fusari* v. *Steinberg*, 419 U.S. 379, 391 (1974) (Burger, C.J., concurring).

WNEV-TV respectfully suggests that this case presents the Court with the opportunity to advance the law of arbitrability and to reduce confusion and uncertainty confronting the courts in their attempts to apply the principles of the Steelworkers Trilogy, recently reaffirmed in *AT&T*. WNEV-TV respectfully urges this Court to accept its case for full review.

Argument

In *Royal*, this Court again considered a petition for writ of certiorari in a matter concerning the broad issue of arbitrability. This Court granted certiorari. It vacated the judgment of the United States Court of Appeals for the Ninth Circuit and remanded the matter for further consideration in light of its decision in *AT&T*. *See* 54 U.S.L.W. 3696 (April 22, 1986).

In the ruling below, the Ninth Circuit, based on precedent of this Court, had decided after rehearing that the survivability of an arbitration agreement and the scope of an arbitration clause are questions to be determined by it, and not the arbitrator. *See Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226* v. *Royal Center, Inc.*, 754 F.2d 835, 837-838 (9th Cir. 1985). Based generally upon its application of *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564 (1960), and, more particu-

larly, *Nolde Bros. Inc.* v. *Local No. 385, Bakery & Confectionery Workers Union*, 430 U.S. 243 (1977) and *John Wiley & Sons* v. *Livingstone*, 376 U.S. 543 (1964), the Ninth Circuit had held that the arbitration agreement survived termination and that the two grievances of the union,[2] including the "alter ego" claim, were within the scope of the arbitration clause. *Id.* at 840. Royal Center, Inc. sought review by this Court.

Since the Ninth Circuit had determined arbitrability as it was required to do, this Court's remand was, of necessity, for reconsideration of the scope of arbitrability in an area relatively well developed by the prior decisions of this Court in *Nolde, supra*, and *Wiley, supra*. Nonetheless, the Court determined that reconsideration was appropriate apparently to review and reconsider the balance that was struck by the Ninth Circuit between the presumption of arbitrability, on the one hand, and the contract as the exclusive source of rights, on the other hand.

Here, the questions presented are much more focused. They are in areas which are both unsettled and not previously illuminated by decisions of this Court.

One question—which has not been considered ever by this Court—involves a failure to follow contract process under a contract which contains a specific provision barring arbitration where such a failure occurs. There is also a question as to the scope of the arbitration agreement, as there was in *Royal*. But, here, the question of scope—whether a non-contractual past practice claim may be arbitrated as of right under a contract-based arbitration clause—is one never previously considered by this Court, in contrast with *Royal* which follows in the trail of *Nolde, supra*, and *Wiley, supra*. A related ques-

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[2] One grievance involved an alleged contract violation which occurred after the termination of the collective bargaining agreement. The second grievance involved the union's contention that the collective bargaining agreement was binding on a second company because it was the "alter ego" of the bargaining company.

tion also is presented where contract sections belatedly cited to support the non-contractual past practice claim do not on their face even remotely support the claim. Such question raises doubts both under *American Manufacturing*, *supra* at 568, and under *Wiley*, *supra* at 555, as to whether an arbitral award can find support in the contract and receive judicial sanction.

In contrast to *Royal*, there is also presented here a question as to who decides arbitrability. The First Circuit declined to do so in this case, as the Fifth Circuit declined to do in *AT&T*, but, in comparison, the Ninth Circuit did so in *Royal*.

The Court's action in *Royal*, a case generally informed by the Steelworkers Trilogy and specifically informed by *Nolde*, *supra*, and *Wiley*, *supra*, when compared to this case, a case involving focused questions which are not specifically informed by any decision of this court, reinforces the appropriateness of granting the Petition here and accepting the case for full review in the interest of advancing the law of arbitrability, and clarifying longstanding areas of uncertainty.

Alternatively, *a fortiori*, this is a case for the Court to take the same action it took in *Royal*. At the very least, the Court should grant certiorari, vacate the decision below and remand this case to the First Circuit for further consideration in light of *AT&T*. As pointed out above, this case involves referring a question of arbitrability to the arbitrator and deciding questions of the scope of the Agreement and its arbitration clause in areas not previously illuminated by decisions of this Court. In these respects, it is beyond *Royal* and presents a far easier case for summary disposition, if the court is not persuaded that full review is warranted.

Conclusion

For the reasons stated in the Petition, the supplement and this second supplement, this Court should grant the Petition herein and review fully the First Circuit's decision. Alternatively, it should proceed by summary disposition, as it did in *Royal*, and vacate and remand for "further consideration in light of *AT&T*."

Respectfully submitted,

LAURENCE S. FORDHAM, P.C.
ANN E. JOHNSTON
FORDHAM & STARRETT
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300
Attorneys for Petitioner

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1651.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WNEV-TV, NEW ENGLAND TELEVISION CORP.,
PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Respondent in Opposition.

JOSEPH G. SANDULLI,
(Counsel of Record)
SANDULLI & GRACE,
131 State Street, Suite 724
Boston, Massachusetts 02109
(617) 523-2226

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Questions Presented

1. Does the Union's allegation that the Employer violated six clauses of the collective bargaining agreement state a dispute as to the "interpretation, application, or performance of this agreement," within the meaning of the arbitration clause.

2. A. Are the questions about the timeliness and the amendment of the grievance procedural matters properly referred to the arbitrator.

B. Is the Court foreclosed from considering procedural questions about the grievance because the Employer failed to cross-appeal from the District Court.

3. Does a past practice become part of the "law of the shop" such that a dispute over its termination is arbitrable.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WNEV-TV, NEW ENGLAND TELEVISION CORP.,
PETITIONER,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1228, AFL-CIO,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Brief of Respondent in Opposition.

Statement of the Case

This is an action by a Union to compel an employer to arbitrate a question of interpretation of a labor contract. The Union wants to arbitrate whether the Employer violated the contract by eliminating an employee lounge. The facts are cited as (R. ____) from the Record Appendix of documents which the parties jointly filed in the Court of Appeals.

The International Brotherhood of Electrical Workers, Local 1228, AFL-CIO, hereafter the Union, and WNEV-TV, New England Television Corporation, the Employer, are parties to a collective bargaining agreement effective from April 1, 1983 through July 1, 1986 (R. 11). The agreement provides for a grievance procedure to resolve:

> All complaints, disputes or questions as to the interpretation, application, or performance of this agreement.

The agreement also contains a no-strike clause which states that:

> ... there will be no work actions, strikes (whether general, sympathetic or otherwise), picketing, boycotting, or any other interference with the Employer's operations during the life of this agreement...

(R. 42).

Prior to April, 1984, the Employer provided the Union employees with a lounge on the company premises (R. 72). In early April, the Employer eliminated the lounge and the Union grieved (R. 65, 66, 72, 73). The grievance protested the "Elimination of Technician Lounge on 2nd Floor" and cited reliance upon "past practice" (R. 66). As the Union tried to process the grievance through the contractual procedures, the Employer took the position by letter of May 4, 1984 that:

> This is not a matter which is subject to the grievance and arbitration procedures.

(R. 73, 100).

The Union requested arbitration by letter of July 3, 1986 and amended the grievance to cite one contract article (R. 67, 73). When the Employer responded that "There is no provision in our collective bargaining agreement pertaining to the Technicians' lounge," (R. 74, 103), the Union cited six contract provisions which were violated by the elimination of the lounge (R. 69-70). The Employer made no objection to the Union's changes in the grievance (R. 108).

When the Employer still refused to arbitrate, the Union brought suit on September 21, 1984 to compel the Employer to arbitrate the issues of:

> Whether the elimination of the Technicians' lounge violates the collective bargaining agreement and what is the proper remedy?

(R. 6).

The District Court, Skinner J., dismissed the Complaint with the conclusion that "(t)he cited articles do not create a duty to maintain a technicians' lounge" (Pet. for Cert. A-15). The Union appealed to the First Circuit which reversed and remanded (Pet. for Cert. A-10). The Circuit held arbitrable the Union's claims about the violation of the six contract clauses, the violation of the past practice, and the propriety of the amendment of the grievance (Pet. for Cert. A-6, 8, 11). The Circuit denied rehearing en banc and the Employer petitioned for Certiorari.

Reasons for Denying the Writ

The First Circuit held the grievance arbitrable on two alternative grounds. First, the Court found arbitrable the alleged violation of six contract clauses along with any procedural questions about whether the grievance was properly amended to state such violations. Second, the Court found that the original grievance, which cited only "past practice," was itself arbitrable. The first ground turns on an examination of the unique facts of this case: the six substantive clauses and the aspects of the grievance procedure that may control the timeliness or amendment of a grievance. The first ground has no implications beyond this contract and is therefore not an issue worthy of Certiorari even if the Circuit were dead wrong in its analysis of the contract. Because the decision of the Circuit can stand on this first ground, it is inappropriate to grant Certiorari to review the second independent alternative ground. The second ground involves the arbitrability of a past practice, another question which turns on the phraseology of this contract and is therefore inappropriate for Certiorari. While the Employer will point to cases which are alleged to have held that violations of past practice are not arbitrable, some of those cases simply do not hold what the Employer claims they do, others have been distinguished,

narrowed, and confined to their own facts, and the lead case has been widely criticized and rejected. The Circuits themselves do not perceive any conflict. Finally, both the first and second grounds of the First Circuit's decision adhere strictly to the principles set forth by the Supreme Court.

I. The Determination of Arbitrability of the Dispute Over the Six Contract Clauses Is a Factual Matter Unique to this Case and Inappropriate for Certiorari.

The principles of arbitrability were clearly stated 25 years ago in the *Steelworkers Trilogy: Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 2d 1403 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960); and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960). The principles were recently reaffirmed and restated in *AT&T Technologies Inc. v. Communications Workers of America*, ____ U.S. ____, 106 S.Ct. 1415, 54 U.S.L.W. 4339 (1986). While the Petitioner filed an eight page supplemental brief ostensibly to deal with that case, *AT&T Technologies* does not change the prior law one iota. It merely brings into line a Circuit that tried to create an *exception* to the *Trilogy*.

The principles of arbitrability are that 1) arbitration is a matter of contract, 2) the court must determine arbitrability, 3) the court must avoid resolving the merits of grievances, allowing even frivolous claims to be arbitrated, and 4) there is a presumption of arbitrability that may be rebutted only by forceful evidence of a purpose to exclude from arbitration. 106 S.Ct. at 1418-1419.

These principles were expressly applied by the First Circuit and they are not disputed by the parties. The Employer simply disagrees with the application of these principles to the facts of this case. The Employer would ask the Supreme Court

to examine the grievance and the six contract clauses and to second-guess the First Circuit as to whether there is a real dispute about the interpretation of the contract. It is not the role of the Supreme Court to re-examine every such determination of arbitrability. These questions turn on the facts and contract clauses of each case; they have no implications for any other case.

II. The Dispute Over the Six Contract Clauses Is Arbitrable.

The Union argued that the abolition of the lounge violated a contract clause restricting the Employer to only "reasonable rules" (R. 70). It also argued that the continued existence of the lounge was implied by five other contract clauses which set forth meal periods, work breaks, and the rights to organize and represent employees (R. 69-70). The contention was that the lounge was an indispensable element in the exercise of the rights under these clauses.

The WNEV-IBEW contract contains a very broad arbitration clause which applies to disputes over the "interpretation application or performance of this agreement." The Union's claims appear to be such disputes. There is nothing in the contract declaring that these particular clauses are not arbitrable. The broad no-strike clause would appear to prohibit strikes over such disputes. Therefore, the disputes ought to be arbitrable under the principles of the *Trilogy*. Before it erroneously endeavored to decide the merits of the Union's grievance, even the District Court agreed that "plaintiff's analysis appears to create an issue sufficiently substantial to require submission to an arbitrator" (Pet. for Cert. A-15). The First Circuit unanimously reached the same conclusion.

The Employer's disagreement seems based on the contention that implied rights are not arbitrable. There is no such exception to the principles of the *Trilogy* for implied rights.

To the contrary, the *Trilogy* expressly sanctioned the arbitration of implied rights. In *Warrior & Gulf, supra,* the Supreme Court ordered arbitration of a grievance protesting the contracting out of bargaining unit work. The Union gave no citation of a clause expressly prohibiting contracting out; it claimed that other clauses like a no-lockout clause implied such a prohibition:

> . . . we charge that the Company is in violation of the contract by inducing a partial lockout, of a number of the employees who would otherwise be working were it not for this unfair practice.

Warrior & Gulf, 363 U.S. at 576.

Arbitrability of implied rights is an accepted application of the basic principles:

> Perhaps because of a desire to avoid thus passing upon the substance of the plaintiff's claim in a section 301 action, many courts have construed the standard arbitration clause to cover claims which, while perhaps not addressed explicitly in the labor contract, may be plausibly asserted by inference.

Gorman, Labor Law, (West Pub. Co. 1976) at p. 559

III. Questions About the Timeliness of the Grievance Are Procedural Matters for the Arbitrator.

The Employer complains that the Union's claim of violation of six contract clauses is untimely and therefore inarbitrable. The principles controlling the arbitrability of such procedural questions are longstanding and unambiguous. In the case of *John Wiley & Sons v. Livingston,* 376 U.S. 543 (1964), the Court established that matters of procedural arbitrability were for the arbitrator to decide. Specifically, it held that the timeliness of a grievance was for the arbitrator. In *International Union of Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487 (1972) the Court held that a four year delay in

the processing of a grievance was a procedural question for the arbitrator. The First Circuit applied these legal principles.

In the presence of such clear statements of the law, it is surprising that the Employer challenges this aspect of the First Circuit's decision. Even if the First Circuit had misapplied the law to the facts and contract clauses of this case, this would not be a matter for Certiorari. The resolution of the issue would again have no implications beyond the instant contract. However, there was no misapplication of principles. The Circuit recognized that the Union could make a plausible argument that it could file a grievance within the 30 day period, that it had the right to amend the grievance after the 30 day period and that the amendment would relate back to the original grievance. Such arguments quite clearly raise the procedural questions which are appropriate for the arbitrator.

A final reason for which these procedural questions should not be dealt with by the Court is that the Employer failed to cross-appeal the disposition of the issue in the District Court. The questions of timeliness of the Union's claims were rejected or ignored by the District Court which went right to the merits of the Union's six contractual claims. While the general rule is that an appellee need not cross-appeal to pursue arguments which were raised but rejected by the District Court, the timeliness of a claim is an exception to the rule. The successful appellee must cross-appeal to pursue the timeliness issue. *Alaska Industrial Board v. Chugach Electrical Association, Inc.*, 356 U.S. 320, 324-325, 78 S.Ct. 735 (1957); *Tallman v. Udall*, 324 F.2d 411, 417 (C.A.D.C. 1963) rev'd on other grounds 380 U.S. 1, 85 S.Ct. 792 (1965); 9 Moore's Federal Practice, par. 204.11 (3) at 449 & 450; Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion*, 87 Harvard L. Rev. 763, 768 (1974).

IV. Past Practices Are Arbitrable: There Is No Uncertainty or Conflict Among the Circuits.

This Court has long ago determined that violations of past practice are arbitrable under the ordinary arbitration clause:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.

Warrior & Gulf, supra, at 581-582.

The Circuits have widely applied that determination and supported the arbitration of past practice claims like the one at issue in this case. *H.K. Porter Co. v. United Saw File and Steel Products Workers of America*, 333 F.2d 596 (3rd Cir. 1964); *Norfolk Shipbuilding and Drydock Corp. v. Local No. 684*, 671 F.2d 797 (4th Cir. 1982); *Safeway Stores v. American Bakery & Confectionery Workers International Union, Local 111*, 390, F.2d 79 (5th Cir. 1968); *Bakery Salesmen v. I.T.T. Continental Baking Co.*, 692 F.2d 29 (6th Cir. 1982), *cert. denied* 462 U.S. 1119 (1983); *Local Union No. 702 v. Central Illinois Public Service Co.*, 324 F.2d 920 (7th Cir. 1963); *Edward Hines Lumber Co. v. Lumber and Sawmill Workers Local No. 2588*, 764 F.2d 631 (9th Cir. 1985); and *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272 (11th Cir. 1982); *Cf. Rainbow Glass Co. v. Local Union No. 610*, 663 F.2d 814 (8th Cir. 1981); and *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. White Motor Co.*, 505 F.2d 1193 (8th Cir. 1974), *cert. denied* 421 U.S. 921 (1975). Any case to the contrary would be at odds with *Warrior & Gulf, supra*, and would outside the mainstream of the prevailing law in the circuits. Nevertheless, the Employer asserts a conflict in the circuits and directs the Court to decisions in the 2nd, 3rd, and 7th Circuits.

The decisions cited from the 7th Circuit are not in conflict with the First Circuit. In *Chicago Web Printing Pressmen's Union v. Chicago Newspaper Publishers' Association*, 772 F.2d 384 (7th Cir. 1985) the parties arbitrated the Union's claim that the company violated a longstanding practice. The arbitrator rejected the claim and the Union brought suit to set aside the arbitrator's award. The 7th Circuit upheld the award and concluded that the arbitrator had the right to determine that the practice was no longer enforceable. This case affirms the mainstream principles that past practices are arbitrable matters. It is surprising that the Employer would cite it for a contrary proposition. The other 7th Circuit case cited by the Employer was decided before the *Steelworkers Trilogy*, *Independent Petroleum Workers of America v. Standard Oil Company*, 275 F.2d 706 (7th Cir. 1960). The case expressly relied on pre-*Trilogy* law and has obviously now been overruled. The decision in *Local Union No. 702 v. Central Illinois Public Service Co.*, *supra*, indicates that the 7th Circuit now clearly recognizes the arbitrability of past practices. In that case, the Court ordered the Employer to arbitrate a dispute over the discontinuation of the practice of gas discounts for employees. There was no reference whatsoever to gas discounts in the contract. There was only the standard arbitration clause covering "any disagreement arising . . . under this agreement." *Id.* at 921.

The Third Circuit decision cited by the Employer is a cryptic half-page opinion holding that the termination of the practice of giving Christmas turkeys is not arbitrable. *Boeing Company v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America*, 349 F.2d 412 (3rd Cir. 1965). The case cites no precedent and it seems to be based on the unique factual determination that "arbitration was limited to grievances involving a specific provision of this agreement." *Id.* at 413. The case seems inconsistent with the more thoroughly reasoned opinion in

H.K. Porter Co. v. United Saw, File and Steel Products Workers of America, supra, where the 3rd Circuit confirmed an arbitrator's award of pension benefits to employees who did not meet express contract eligibility requirements. The arbitrator based his decision solely on the past practice of granting such benefits. *Boeing* appears to be overruled by *Ludwig Honnold Mfg. Co. v. Fletcher*, 405 F.2d 1123 (3rd Cir. 1969).

One 2nd Circuit case cited by the Employer is a decision of a District Court which does not preclude the arbitrability of a past practice. *Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co.*, 195 F. Supp. 64 (E.D.N.Y. 1961), aff'd 298 F.2d 647 (2nd Cir. 1962). There the Union claimed a violation of past practices and sued to compel arbitration. The District Court denied the Union summary judgment but allowed the Union to demonstrate at trial that the practices were related to the current agreement. *Id.* at 67. That interlocutory decision was not appealed to the Circuit. 298 F.2d at 647. This case should have no significance in the determination of whether to grant Certiorari.

The main case which the Employer cited from the Second Circuit involved a more reasoned decision to vacate an arbitration award based upon a past practice. *Torrington Company v. Metal Products Workers*, 362 F.2d 677 (2nd Cir. 1966). It contains an even better reasoned dissent. *Id.* at 682. Perhaps because the case contains the only reasoned decision holding a past practice inarbitrable, it has become the lightening rod for criticism. *Holly Sugar Corp. v. Distillery, Rectifying Wine & Allied Workers, Int'l Union, AFL-CIO*, 412 F.2d 899, 905 (9th Cir. 1969); *Dallas Typographical Union No. 173 v. A.H. Belo*, 372 F.2d 577, 583 (5th Cir. 1967); *Cape Cod Gas Co. v. United Steelworkers of America*, 3 Mass. App. Ct. 258, 263 n. 4 (1975). Aaron, *Judicial Intervention in Labor Arbitration*, 20 Stan. L. Rev. 41, 48-51 (1967); Christensen, *Labor Arbitration and Judicial Oversight*, 19 Stan. L. Rev.

671, 690-693 (1967); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Cal. L. Rev. 663, 802, n. 538 (1973); Jones, *The Name of the Game is Decision—Some Reflections on "Arbitrability" and "Authority" in Labor Arbitration*, 46 Tex. L. Rev. 865, 869-874 (1968); Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 34 U. Chi. L. Rev. 545, 552-554 (1967); *Cf.* Nurse, *Custom and Practice in Labour Relations in the United States; A review of the Evidence*, January 1979 Labor Law Journal 38, 43-5 (1979); Gilman, *Past Practice in the Administration of Collective Bargaining Agreements in Arbitration*, IV Suffolk L. Rev. 689, 707-711 (1970).

The Second Circuit itself has now confined the effect of *Torrington*. In the case of *F. & M. Schaeffer Brewing Co. v. Local 49 International Union of Brewery Workers, etc.*, 420 F.2d 854 (2nd Cir. 1970) the 2nd Circuit limited *Torrington* to post arbitration review. It would not rely on *Torrington* to prevent an arbitration. *Id.* at 856. In a subsequent case, the 2nd Circuit appeared to limit *Torrington* to its unique facts involving a practice which "the company had terminated two years before the arbitrated dispute arose" and a negotiation at which the parties discussed reviving the defunct practice but failed to put anything in the contract. *Humble Oil & Refining Co. v. Local 866, International Brotherhood of Teamsters*, 447 F.2d 229, 233 (2nd Cir. 1971). The 2nd Circuit does not appear to have resurrected the aspects of *Torrington* which dealt with past practice. The more recent discussions in the other circuits no longer recognize a conflict over the arbitrability of past practice. The decisions of *Norfolk Shipbuilding and Drydock Corp. v. Local No. 684, supra, Bakery Salesmen v. I.T.T. Continental Baking Co., supra* and *Edward Hines Lumber Co. v. Lumber and Sawmill Workers Local No. 2588, supra*, no longer even discuss *Torrington*.

Conclusion

In addition to all the reasons already discussed, this case is particularly inappropriate for review by Certiorari because the First Circuit's order to arbitrate is *interlocutory*. If the case is allowed to go to arbitration, the arbitrator may dismiss the grievance or may grant it on only one of the many grounds urged by the Union. After arbitration, if the case is not mooted by a dismissal, the issues will be refined and review by the Court will be a simpler process. For all the foregoing reasons the Union asks that Certiorari be denied.

Respectfully submitted,

JOSEPH G. SANDULLI
(Counsel of Record)
SANDULLI & GRACE
131 State Street, Suite 724
Boston, Massachusetts 02109
(617) 523-2226